REPORTS
OF
CASES
ARGUED AND DETERMINED
IN THE
Court of King's Bench,
With Tables of the Names of Cases and Principal Matters.

By EDWARD HYDE EAST, Esq.
OF THE INNER TEMPLE, BARRISTER AT LAW.

Si quid novisti rectius istis,
Candidus imperti; si non, his utere mecum. Hor.

VOL. IV.

Containing the Cases of Trinity, Michaelmas, and Hilary Terms
In the 43d and 44th Year of Geo. III.
1803—1804.

LONDON:
PRINTED BY A. STRAHAN,
LAW-PRINTER TO THE KING'S MOST EXCELLENT MAJESTY;
FOR J. BUTTERWORTH, LAW-BOOKSELLER, FLEET-STREET,
AND J COOKE, ORMOND-QUAY, DUBLIN.
1804.

JUDGES

OF THE

COURT OF KING's BENCH,

During the Period of these REPORTS.

EDWARD Lord ELLENBOROUGH, C. J.
Sir NASH GROSE, Knt.
Sir SOULDEN LAWRENCE, Knt.
Sir SIMON LE BLANC, Knt.

ATTORNEY-GENERAL.

The Honorable SPENCER PERCEVAL.

SOLICITOR-GENERAL.

Sir THOMAS MANNERS SUTTON, Knt.

A

TABLE

OF THE

CASES REPORTED

IN THIS FOURTH VOLUME.

N. B. Thofe Cafes which are printed in *Italics* [redacted] *MS*. Notes.

ERRATUM.

Page 107, l. 4. from the bottom in the margin, for *defendant* read *plaintiff*; and [illegible]. 3. from the bottom, for *him* read *the defendant*.

CASES

CASES

ARGUED AND DETERMINED

1803.

IN THE

Court of KING's BENCH,



IN

Trinity Term,

In the Forty-third Year of the Reign of GEORGE

MEUX and Others, qui tam, *againſt* HOWELL and ATLEE.

Monday, June 13th.

THIS was an action on the ſtatute 13 *Eliz. c.* 5. wherein the declaration ſtated, that the defendants of their malice, fraud, covin, and colluſion, on the 10th of *June* 1802, at, &c. were parties to a certain feigned, covenous, and fraudulent ſuit againſt one *J. Norton*, in which a certain feigned, covenous, and fraudulent judgment againſt him, to which the defendants were alſo

After a creditor had diſtrained for rent the goods of his debtor, who was alſo under engagement with the creditors' agent for the ſale of his goods, for the purpoſe of diſcharging the rent, and alſo certain book debts due to ſuch creditor and his agent, the debtor confeſſed judgment to the defendant, another creditor, for a large nominal ſum, with a defeazance that execution ſhould only iſſue for ſuch an amount as would cover the debt of the defendant, and all the other creditors amongſt whom a rateable diſtribution was to be made: held, that ſuch judgment confeſſed, being in fact made bonâ fide, and upon good conſideration, was not covenous or fraudulent within the ſtat. 13 *Eliz. c.* 5., although its effect might be to delay or hinder ſuch firſt-mentioned creditor from recovering the whole amount of his demands. Neither could it be ſaid to delay or hinder at all his recovering the rent due to him, and for which he had diſtrained, ſuch diſtreſs having a legal priority. But it ſeems that the penalty given by the third clauſe of the ſtatute attaches as well upon a covenous *judgment* as upon a covenous *bond*, though the latter alone be named in that part of the clauſe.

 parties,

1803.

MEUX qui tam *againſt* HOWELL.

parties, was ſigned and entered of record in *B. R.* as of *Eaſter* term, 42 *Geo.* 3.; by which ſaid judgment the defendants feignedly, covenouſly, and fraudulently recovered againſt the ſaid *J. N.* as well a ſuppoſed debt of 800*l.* as alſo 63*s.* damages, &c. to the purpoſe and intent to delay, hinder, and defraud the plaintiffs of their juſt debt, the plaintiffs then being creditors of the ſaid *J. N.* for a debt of 176*l.* &c.; which ſaid feigned, covenous, and fraudulent judgment, the defendants being parties and privies to, and knowing of the ſame, afterwards, on 12th *June* 1802, at, &c. did wittingly and willingly put in uſe, avow, maintain, and defend as true, ſimple, bonâ fide, and upon good conſideration, contrary to the form of the ſtatute, &c.; by reaſon whereof an action hath accrued to the plaintiffs, they being the parties aggrieved, &c., to demand 803*l.* 3*s.*, being ſo much contained in the ſaid feigned, covenous, and fraudulent judgment, &c. Plea, nil debet.

At the trial before Lord *Ellenborough* C. J. at the ſittings after laſt *Hilary* term, at *Weſtminſter*, the plaintiff recovered a verdict upon the firſt count of the declaration above ſtated; and upon a rule niſi obtained in the laſt term for ſetting aſide the verdict (*a*) and entering a nonſuit, or arreſting the judgment, which ſtood over till now, the following facts appeared.

The plaintiffs were brewers, and landlords of a public houſe tenanted by *J. Norton*, who was indebted to them 92*l.* 10*s.* for three years' rent in arrear, and alſo 116*l.* for

(*a*) The grounds on which the verdict was at firſt impeached were, that the judgment confeſſed by *Norton* was not under the circumſtances *fraudulent* within the meaning of the ſtatute 13 *Eliz.* c. 5.; or if it were, that the verdict ought to have been taken on another count for the 500*l.*, the amount of the defeazance. But on ſhewing cauſe, the argument and the judgment turned ſolely on the firſt ground.

1803.

MEUX qui tam *against* HOWELL.

beer ſupplied to him by the plaintiffs. On the 11th of *May* 1802 the plaintiffs diſtrained for the 92*l.* 10*s.* rent in arrear, and an agent was put in poſſeſſion of the goods diſtrained on the premiſes, but no ſale was made, *Norton* applying to them for time to ſettle his affairs, and agreeing that the plaintiffs' agent ſhould continue in poſſeſſion of the diſtreſs in the mean time. Prior to the ſending in the diſtreſs *Norton* was arreſted by the defendants, who were diſtillers, for 42*l.*, for which he had at firſt given bail, but on the 12th of *May* was rendered in diſcharge of his bail. On the 19th of *May* *Norton* having agreed to diſpoſe of his buſineſs to one *J. W.*, while the plaintiffs' diſtreſs ſtill continued, entered into an agreement in writing with the plaintiffs' agent *Deady*, whereby he requeſted him to let *J. W.* into poſſeſſion of his (*Norton*'s) houſe for 30*l.* good-will, and to ſell by appraiſement all the goods, fixtures, and ſtock in trade on the premiſes to *J. W.* before the 24th of *May*, and after ſuch ſettlement *Deady* was to pay all the rent, taxes, expences, and the book debt due to *Meux* and Co., and another debt to him, (*Deady*,) and another to his brother; the overplus to be returned to *Norton*, &c. In conſequence of this authority *Deady* procured the goods, &c. to be appraiſed, and the groſs amount was 236*l.* 7*s.* 3*d.*, out of which certain deductions were to be made for taxes, expences, &c. The defendants being appriſed by *Norton* of theſe circumſtances, on the 25th of *May*, while the plaintiffs' agent was ſtill in poſſeſſion under the diſtreſs, the defendant *Atlee* told *Norton* that he ſhould be very ſorry that *Deady* ſhould run away with the whole of the property, and that if he (*Norton*) would conſent to ſign an inſtrument, he would give him his diſcharge immediately. What the inſtrument was *Norton* did not know till he had ſigned

1803.

Meux qui tam *against* Howell.

it; but *Atlee* propoſed that it ſhould be for the benefit of the creditors in general. *Norton* did not himſelf conſult any of his creditors, of whom he had ſeveral, but left that to *Atlee*. *Norton*, however, ſwore that he did not ſign the inſtrument for the purpoſe of defeating the plaintiffs' diſtreſs; and at the time of the trial he was ſtill in cuſtody at the ſuit of the defendants. This inſtrument, which was prepared by Mr. *Wild*, the attorney for the defendants, was a warrant of attorney to confeſs judgment for 800*l.*, with a defeazance that execution ſhould iſſue to levy 500*l.*, (which the defendants' attorney computed to be the probable amount of the debts,) and that with the produce of the ſale an equal diſtribution ſhould be made amongſt all the creditors. Under this power judgment was entered up on the 10th of *June*, and execution iſſued on the 12th, when all the goods were ſold for about 104*l.*, and no part of the money was paid to the plaintiffs either on account of their diſtreſs for the rent, in reſpect of which the plaintiffs' agent was ſtill on the premiſes, with *Norton*'s conſent, or for their book debt: but a tender was made to the plaintiffs as for the rent, (but leſs than the two years' rent,) which they would not receive. The defendants had not previouſly conſulted any of the other creditors of *Norton*; but *Atlee*, in anſwer to one of them who afterwards called upon him, ſaid, that he meant to divide the money equally amongſt the creditors as ſoon as he could procure a liſt of them. On the part of the defendants, Mr. *Wild* their attorney ſwore, that the inſtructions he received from them was merely to take ſuch meaſures as the occaſion required to effect an equal diſtribution of *Norton*'s property amongſt all his creditors, leaving the particular mode of doing it to him (*Wild*); in conſequence of which he prepared the warrant of attorney on

on which the judgment in queſtion was entered up. The defeazance was taken for 500*l.*, conſidering that to be about the amount of *Norton*'s debts altogether. It was left to the jury to conſider whether the defendants were privy to the actual judgment and execution, founded upon the power of attorney prepared by *Wild* their agent, or merely to the general object of obtaining poſſeſſion of the property to prevent the plaintiffs from ſatisfying their demand in prejudice to the general creditors. The jury found, that the defendants were privy to the means uſed as well as to the general object, and found a verdict for the plaintiffs for 803*l.* 3*s.*

1803.

MEUX qui tam *against* OWELL.

Erſkine, *Garrow*, and *Lawes*, ſhewed cauſe againſt the rule. The penalty accrues within the ſtatute 13 *Eliz.* *c.* 5. (*a*), upon the mere ſigning of the fraudulent judgment,

(*a*) The ſtat. 13 *Eliz.* *c.* 5. "for avoiding feigned, covenous, and "fraudulent feoffments, gifts, grants, alienations, conveyances, bonds, ſuits, "judgments, and executions, as well of lands, &c. as of goods, &c; which "feoffments, &c. have been deviſed of malice, fraud, covin, colluſion, or "guile, to the end, purpoſe, and intent to delay, hinder, or defraud creditors "and others of their juſt and lawful actions, ſuits, debts, accounts, damages, "&c. not only to the let or hindrance of the due courſe and execution of "law and juſtice, but alſo to the overthrow of all true and plain dealing, &c." declares and enacts, *ſ.* 2. "that all and every feoffment, &c. and all and "every bond, ſuit, judgment, and execution, to or for any intent or purpoſe "before declared and expreſſed, ſhall be from henceforth deemed and taken "(only as againſt that perſon or perſons, his or their heirs, executors, &c. "whoſe actions, ſuits, debts, accounts, damages, &c. by ſuch guileful, cove- "nous, or fraudulent devices and practices as is aforeſaid are, ſhall, or might "be in anywiſe diſturbed, hindered, delayed, or defrauded) to be utterly void "and of none effect, any pretence, colour, feigned conſideration, expreſſing "of uſe, or any other matter or thing to the contrary notwithſtanding." And by *ſ.* 3 "All and every the parties to ſuch feigned, covenous, or fraudu- "lent feoffment, &c. bonds, ſuits, judgments, executions, and other things

 "before

1803.

Meux qui tam against Howell.

ment, though it ſhould not have been ſucceſsful in delaying or defrauding a creditor, and the ſtatute avoids it if obtained *to the end* to *delay* creditors. And though the latter part of the third clauſe creating the penalty only refers in terms to "ſo much money as ſhall be contained "in any ſuch covenous and feigned *bond*," dropping the other words, "ſuits, judgments, and executions," coupled with the word "bond" in the former part of the clauſe; yet the word *bond* is there put only, for brevity ſake, as an inſtance of the fraudulent inſtruments and acts before enumerated in the antecedent part, all of which muſt, from the neceſſary conſtruction of the clauſe, and the reaſon of the ſtatute, be intended to be included, as if the word "bond" were followed by an "&c." And all the words occur again in the ſubſequent part of the clauſe, where the penalty is diſtributed, one moiety to the informer, the other to the party grieved by ſuch feigned "bonds, ſuits, judgments, and executions." The ſtatute has alſo the word *privy* as well as *party;* and it was ſaid at the trial, that a man might be a party to a fraudulent judgment without being privy to it, as if he were made a party without his knowledge: but if an authority be given to an attorney to effect a particular purpoſe for another,

"before expreſſed, and being *privy* and knowing of the ſame, which ſhall "wittingly and willingly put in ure, avow, maintain, juſtify, or defend the "ſame as true, ſimple, and done, had, or made bonâ fide and upon good con- "ſideration, or ſhall alien any the lands, goods, &c. ſhall incur the penalty "and forfeiture of one year's value of the ſaid lands, &c. and the whole "value of the ſaid goods, &c. and alſo ſo much money as ſhall be contained "in any ſuch covenous and feigned bond, the one moiety to the queen, &c. "the other to the party or parties grieved by ſuch feigned and fraudulent "feoffment, &c. bonds, ſuits, judgments, executions, &c.; and alſo being "thereof lawfully convicted, ſhall ſuffer impriſonment for one half year "without bail or mainpriſe."

that

1803.

MEUX qui tam *against* HOWELL.

that other is bound by any act of his attorney in effecting that purpoſe, it being within the ſcope of his authority. [Lord *Ellenborough* C. J. It was left by the defendants to the diſcretion of their attorney in what way to act ſo as to ſecure their lawful claim: and though they might be anſwerable civiliter for what was done by him under that authority, yet I thought that the defendants muſt have had knowledge of the means uſed in order to ſubject them to a penalty, within the words of the ſtatute.] At any rate, the jury having found that the defendants were privy to the means uſed, the verdict concludes that fact. Then here not only the *debt* and *account* of the plaintiffs, but the *diſtreſs* which gave them poſſeſſion of the thing itſelf out of which ſatisfaction was to be made to them, was delayed and hindered by the fraudulent judgment and execution which were obtained for that expreſs purpoſe. Laſtly, the covenous nature of the judgment was evidenced by the amount of the ſum for which it was taken, viz. 800*l.*, with a defeazance to levy 500*l.*, ſo much exceeding the defendants' own debt, which was only 42*l.*, and for which alone they were authoriſed to take a judgment by confeſſion, and ſue out execution thereon. And that is not explained by ſaying that it was done for the purpoſe of ſharing the inſolvent's effects amongſt all the creditors; for there was no previous aſſent of the creditors to take the defendants as their paymaſters in the diſtribution, nor had they any knowledge of the fact. The covenous intent was further evidenced by the defendants' ſtill holding *Norton* in cuſtody at their ſuit in the original action for their own debt. It alſo appeared that the judgment was expreſsly obtained for the purpoſe of defeating the plaintiffs' diſtreſs for rent, and the agreement with *Norton* for diſcharging their book debt. [*Lawrence* J. How could

1803.

Meux qui tam against Howell.

the distress, which was in first, be defeated by the subsequent judgment and execution? Even if there had been no distress, the landlord was entitled by the statute (*a*) to a year's rent in arrear, which must have been paid by the sheriff when he levied under the judgment.] [Lord *Ellenborough*. The plaintiffs were still in possession under the distress when the sheriff entered, and had not sold under it. Non constat but that the sheriff has the rent in his hands still. It did not appear at the trial how this fact was. If then the distress were regular, the plaintiffs were not delayed in point of *law* by the judgment and execution, though they may have been delayed *in fact* by their voluntarily withdrawing themselves from the distress which they held at the time. The question may however be open to them to contend in respect of their claim for the book debt.] The statute has the word *account*: and here the settling of their account has been defeated by the defendants' judgment and execution, and the distress for the rent at least delayed in fact. The object of the statute was to attach on fraud, and to extend protection even to creditors who had not sued out process against their debtors before such covenous judgments. But here the plaintiffs' agent had authority from *Norton* to sell his goods for the book debt as well as for the rent in arrear. It is no answer to say that the plaintiffs may come in with the other creditors pari passu; for except in cases of bankruptcy every creditor has a right to obtain a preference if he can; and here the judgment and execution obtained by the defendants is in effect to operate as a commission of bankrupt sued out by their sole authority, who thereby carve for themselves out of the debtor's

(*a*) 8 *Ann* c. 14. *s.* 1.

effects

effects in prejudice of another creditor who had obtained a legal preference. This therefore is not like the case of *Holbird* v. *Anderson* (a), where a debtor being sued to judgment by *A.* a creditor, voluntarily confessed judgment to *B.* another creditor for the amount of his debt, who thereupon entered immediately and levied before *A.*'s execution; which preference was holden good, and not within the stat. 13 *Eliz. c.* 5. That was no more than a race for priority between two creditors, to one of whom it was competent for the debtor to give a preference. [*Lawrence* J. May not a person indebted to several, without the imputation of fraud, confess a judgment to a trustee to enable him to take all his property for the benefit of all his creditors equally? Does not a court of equity act upon the same principle in the distribution of assets? And why should there be a previous consent of the cestuy que trusts, if they consent afterwards?] It would be fraudulent within the statute of *Elizabeth*, if done with intent to defeat a particular creditor who had obtained a priority. [*Le Blanc* J. Then the plaintiffs must contend that it is fraudulent for a person, not the object of the bankrupt laws, to make the same provision voluntarily for the benefit of all his creditors, which the law compels to be done in the case of a bankrupt trader.] It might have been different if this had arisen from the voluntary act of the debtor himself; or if the defendants had procured the judgment with the consent of the other creditors, intending to include the plaintiffs; but the fact was not even known to the other creditors, nor was there any schedule of them, nor were the defendants declared to be trustees; so that but for this dispute they might have retained to themselves

(a) 5 *Term Rep.* 235.

1803.

Meux qui tam *againſt* Howell.

the whole fruits of the judgment and execution, and the inſertion of the truſt was merely for the purpoſe of covering the deſign of defeating the plaintiffs' priority for their own benefit. It is a common replication to a plea by executors of a judgment recovered, which is unſatisfied, that judgment was acknowledged by the executors for a larger ſum than was due to the party: and it would not be competent to rejoin that the teſtator owed ſo much more to other creditors, and that the judgment was confeſſed to ſecure thoſe debts as well. [*Lawrence* J. Why may not ſuch a plea ſtate that the teſtator was indebted to *A. B.* and *C.* in ſo much reſpectively, and that the judgment was acknowledged to *A.* in truſt to ſecure all their debts?] Here there was no authority from the other creditors, nor communication with them, which put it at leaſt in the power of the defendants to diſown the truſt. In *Cadogan* v. *Kennett* (*a*), Lord *Mansfield* ſays, that the ſtat. 13 *Eliz.* cannot receive too liberal a conſtruction in ſuppreſſion of fraud againſt creditors. The Legiſlature, by giving the penalty to the party grieved, whoſe debt is even *delayed*, meant to prevent the very attempt to defraud; for even at common law, every proceeding with intent to defeat or delay creditors in general is fraudulent and void: and here the jury by their verdict have found that the plaintiffs were parties grieved.

Gibbs and *Holroyd* in ſupport of the rule. The argument, ſo far as it relates to the diſtreſs, has already received an anſwer from the Court. The defendants' execution could not countervail or delay the plaintiffs' diſtreſs, which was in before. The relinquiſhment of poſſeſſion, therefore, under the diſtreſs, was the voluntary act of

(*a*) Cowp. 434.

the

1803.

MEUX, qui tam, *against* HOWELL.

the plaintiffs' agent. The defendants could not authorize the ſheriff to reſiſt the diſtreſs; and it does not appear but that the ſheriff has retained in his hands ſufficient to anſwer it. Then as to the agreement between *Norton* and *Deady*, whereby the former gave *Deady* authority to ſell his effects, that at moſt could only make *Deady* a purchaſer of the goods, and could not transfer any property in them to the plaintiffs. The queſtion, then, ariſes ſolely as the plaintiffs were ſimple contract creditors of *Norton*, before any ſuit commenced, at the time of the defendants' judgment and execution, whether the plaintiffs have been *delayed* by this proceeding? The ſtatute 13 *Eliz.* muſt be conſtrued ſtrictly, not only as it inflicts a penalty, but as it alſo ſubjects the offender to impriſonment. The judgment muſt be *fraudulent in fact*, in order to bring the party obtaining it within the penalty; for the ſtatute does not merely ſay that the puniſhment ſhall attach if the judgment ſhall have the effect of defeating or delaying other creditors, but generally if it be fraudulent. The facts are, that while *Norton* was in cuſtody at the ſuit of the defendants, the plaintiffs, by their agent *Deady*, procured him to enter into an agreement, whereby he firſt ſtipulated for the payment of the plaintiffs' debt, then for the debt of *Deady* himſelf, and afterwards for another debt to *Deady*'s brother. This was an endeavour to overreach the defendants, who, on their part, were only deſirous of ſharing *Norton*'s effects in common with all his other creditors, and who thereupon obtained the warrant of attorney, &c. for that purpoſe. Nothing, therefore, could be more fair and honeſt than their object; and it being admitted that they might legally have ſecured their own debt in this manner, a fortiori it could not be fraudulent to ſecure only an equal

ſhare

1803.

MEUX, qui tam, *against* HOWELL.

ſhare to themſelves with the other creditors: the loſs, if any, was to themſelves. *Norton* himſelf proved that the object was to divide the effects fairly; and one of the creditors, who came to inquire, was informed that a diviſion would be made as ſoon as the amount of the debts could be aſcertained; which is ſufficient to ſhew that the tranſaction was not ſecret and colluſive. In *Eſtwick* v. *Caillaud* (*a*), Ld. *Kenyon* ſays, it is neither illegal nor immoral to prefer one ſet of creditors to another. And there a deed, conveying part of a debtor's real and perſonal property in truſt to divide amongſt certain of his creditors, without any fraudulent intention of thereby delaying others not named, was holden good. Again, in *Nunn* v. *Wilſmore* (*b*), his lordſhip ſaid that, putting the bankrupt laws out of the queſtion, a debtor might aſſign all his effects for the benefit of particular creditors: and this he ſtates without any exception of caſes within the ſtat. 13 *Eliz.*, though he immediately after proceeds to notice that ſtatute. And in *Ingliſs* v. *Grant* (*c*), an aſſignment of all a man's effects in truſt for creditors (being executed in *India*, and therefore not an act of bankruptcy here) was deemed valid, and not fraudulent in itſelf, being intended honeſtly at the time, and aſſented to by the generality of the creditors. If this tranſaction were to be deemed fraudulent every truſtee may be involved in fraud and ſubject to the penalties of the act who accepts a truſt-deed for all a man's creditors, without knowing from each whether he had agreed to it: and perhaps each party grieved might recover on the ſtatute. If, then, this judgment were not *fraudulent*, its effect in delaying a creditor will not bring it within the ſtatute;

(*a*) 5 *Term Rep.* 424. (*b*) 8 *Term Rep.* 528. (*c*) 5 *Term Rep.* 530.

for

1803.

MEUX, qui tam, *against* HOWELL.

for otherwise the case of *Holbird* v. *Anderson* (*a*) could not have been decided as it was. It is even difficult to make out how the plaintiffs have been delayed, as no legal proceedings had been before commenced by them for their book debt. The cases on which the statute meant to attach were where debtors endeavoured to protect their property against their creditors by making or giving pretended assignments or judgments, for which there was in truth no consideration or an inadequate one. Such acts are void, according to *Twyne*'s case (*b*), if done without consideration, or, though given on due consideration, if the possession remain with the debtor, whereby he is enabled to deceive the world by holding out a false appearance of property: but none of those principles apply to a case like the present, where the security was given to bonâ fide creditors, who immediately took possession under it.

Lord ELLENBOROUGH C. J. It is not every feoffment, judgment, &c. which will have the effect of delaying or hindering creditors of their debts, &c. that is therefore fraudulent within the statute; for such is the effect pro tanto of every assignment that can be made by one who has creditors: every assignment of a man's property, however good and honest the consideration, must diminish the fund out of which satisfaction is to be made to his creditors. But the feoffment, judgment, &c. must be devised of malice, fraud, or the like, to bring it within the statute. Then was this judgment of that sort? For whose benefit was the fraud? *Norton* has extinguished no debt by means of it, further than as the execution shall turn out productive in satisfying the demands of his just

(*a*) 5 *Term Rep.* 235. (*b*) 3 *Rep.* 81. a.

creditors.

1803.

Meux, qui tam, *against* Howell.

creditors. It holds out no protection to him otherwise. He is even left under arrest at the suit of the particular creditor, as he was before the judgment was confessed. Then how are the defendants implicated in any fraud? Instead of having, as they might have had, a satisfaction for their whole debt, by having the judgment confessed to them for that alone, they forego that advantage, and take a judgment confessed for the amount of the debts of the creditors at large, being contented to come in pari passu with the other creditors. They have derived therefore no benefit to themselves. Nor was the judgment confessed in prejudice of any right of the plaintiffs. For their distress which was in could not be defeated by the operation of the judgment. And as to their book debt, they had taken no inchoate legal steps to recover it, for the paper signed by *Norton* operated nothing. The judgment put the plaintiffs in the same situation as the rest of the creditors. It delayed the plaintiffs indeed so far as a proportionable payment to creditors in general is a delay of each of them in particular: but there was no fraud, no colour, no undue protection to the debtor. The defendants were placed in a worse situation than if they had taken the judgment for themselves alone. Therefore unless we were to go the length of saying that every assignment to a creditor is fraudulent as to the rest of the creditors, and prohibited to be made, this was not fraudulent. It has none of the qualities of fraud within the act of parliament, which was meant to prevent deeds, &c. fraudulent in their concoction, and not merely such as in their effect might delay or hinder other creditors.

Grose J. The statute in its whole frame is calculated to prevent certain frauds, and to punish those who are

guilty

1803.

MEUX, qui tam, *against* HOWELL.

guilty of them; and we muſt be ſatisfied that the defendants have been ſo guilty before we can ſay that the verdict ought to ſtand, which is to induce that puniſhment upon them. The firſt clauſe of the ſtatute ſpeaks of judgments, &c. deviſed of "*malice, fraud, covin, colluſion, or guile,*" not only to "the let or *hindrance of the due courſe and execution of law and juſtice,*" but alſo to "*the overthrow of all true and plain dealing.*" The ſecond clauſe ſpeaks of perſons whoſe ſuits, debts, &c. are hindered, delayed, or defrauded "by ſuch *guileful, covenous, or fraudulent devices and practices* as aforeſaid." And the third ſection inflicts puniſhment upon ſuch as put in ure, &c. "as *true, ſimple, and done bonâ fide and upon good conſideration,*" ſuch acts. This ſatisfies me that if the judgment, &c. be given bonâ fide and upon good conſideration, it is not within the act. Here there is nothing like a fraud. And it makes one ſhudder to think that perſons who appear like the defendants to have acted moſt honeſtly ſhould have been in any hazard of being ſubjected to puniſhment for having endeavoured to procure an equal diſtribution of their debtors' effects amongſt all his creditors. Their conduct was meritorious, and the judgment confeſſed by *Norton* was not covenous or feigned, but given bonâ fide and upon good conſideration for debts due to the defendants and the other creditors. Therefore I think there ought to be a new trial.

Lord ELLENBOROUGH C. J. then obſerved, that he thought the third clauſe of the act impoſing the penalty, which in one part only mentions the word *bond*, had had a fair conſtruction put upon it by the plaintiffs' counſel; and that it muſt be taken to extend to feoffments, judg-

ments,

1803.

Meux, qui tam, *against* Howell.

ments, &c. as mentioned in the other parts of the clause.

Lawrence, and Le Blanc, Justices, declared themselves of the same opinion for the defendants.

Rule absolute.

Monday, June 13th.

Nowell *against* Bingham.

The delivery of a declaration against a prisoner, though within two terms, is a nullity if there were no bill filed before: and he is entitled to his discharge under the rule of Court 5 *W. & M.*

A Rule called on the plaintiff to shew cause why a writ of supersedeas should not issue to discharge the defendant out of custody upon filing common bail, the plaintiff not having filed a bill in due time. The defendant was committed to custody on the 6th of *November*, on a writ then returnable at the suit of the plaintiff: a declaration was delivered to the defendant, then in custody, on the 11th of *February*: on the 23d of *April* interlocutory judgment was signed for want of a plea, and this application was not made till the 10th of *May*.

Millis shewed cause, and contended that it was not necessary that a bill should be filed within two terms after the arrest: it was sufficient, as against a prisoner, that a declaration was delivered within that period. But at any rate the irregularity, if any, had been waved, by not applying sooner than the 10th of *May* to set aside the proceedings: and he referred to *Gehegan* v. *Harper* (*a*), and *Pearson* v. *Rawlings* (*b*).

Per Curiam. By the rule of Court, 5 *W. & M.*, if there be no declaration delivered against a prisoner within

(*a*) 1 *H. Blac.* 251. (*b*) 1 *East's Rep.* 77.

 two

two terms he is entitled to be difcharged. But there can be no declaration if there be no bill filed before. Quoad the rule of Court, therefore the delivery of the declaration was a nullity, and the defendant is entitled to his difcharge.

1803.
NEWELL *againft* BINGHAM.

Marryat was to have fupported the rule.

Rule abfolute (*a*).

(*a*) But the delivery of a declaration is fufficient, without a bill, where the prifoner is in cuftody upon procefs by original. 1 *Tidd's Pr.* 201.

The KING *againft* MORRIS.
The KING *againft* STEWARD.

Wednefday, June 15th.

Where the election of mayor was to be made by the majority of an affembly compofed of feveral integral definite parts of a corporation and other burgeffes and inhabitants *for the time being*; held that one of fuch definite integral parts, being reduced below a majority of its proper number, could no longer be reprefented in fuch corporate affembly, and the whole corporation was thereby diffolved, being no longer capable of continuing itfelf.

AN information in nature of quo warranto filed by leave of the court (*a*) againft the defendant, *Morris*, charged, that he exercifed the office of mayor of the borough and town of *Weymouth* and *Melcombe Regis*, without any legal warrant, &c. from the 21ft of *Sept.* 1801, to the 21ft of *Sept.* 1802. To which he pleaded, that King *James* I. by charter dated 1ft of *July*, in the 14th year of his reign, granted, that the mayor, aldermen, bailiffs, burgeffes, and commonalty of the faid borough and town, and all the burgeffes and inhabitants thereof, by whatever names theretofore known, fhould be one body corporate and politic, &c.: that there fhould be a mayor, divers aldermen, two bailiffs, and twenty-four principal burgeffes who fhould be affiftant unto the mayor, aldermen, and bailiffs *for the time being* in matters concerning the borough and town. He then conftituted one *J. Roye* to

(*a*) Vide *ante*, 213.

1803.

The KING *against* MORRIS.

be the first mayor until the feast of *St. Michael* then next ensuing, and from thenceforth until another should in due time be chosen into the office; and eleven persons to be the first aldermen, who were to continue for life, unless amoved for reasonable cause by the mayor, aldermen, bailiffs, and principal burgesses *for the time being;* and two other persons named to be the first bailiffs; and twenty-four other persons named to be the principal burgesses, to continue for life, unless amoved for reasonable cause by the said mayor, aldermen, bailiffs, and principal burgesses *for the time being, or the greater part of them.* The King also granted that the mayor and aldermen *for the time being, or the major part of them, from time to time, and at all times thereafter for ever,* might yearly chuse and name in the *Guildhall*, &c., *being congregated and assembled together* on the feast of *St. Michael*, four of the burgesses or inhabitants of the borough and town, of which four so to be named and chosen, the mayor, aldermen, bailiffs, principal burgesses, and other burgesses and inhabitants *for the time being*, (they being also for that purpose thereupon the same day congregated and assembled together) should *by the greater part of the voices of them so assembled together* chuse one to be mayor, who should be sworn into office before the last mayor, or the recorder *for the time being*, in the presence of *all* the aldermen and principal burgesses *for the time being which should be then present*, and should execute the said office for one whole year, and until another mayor was appointed, &c. And in case at the death or amotion of any of the aldermen by the mayor and rest of the aldermen, &c. *for the time being* there should not be eight aldermen surviving and remaining, it should be lawful for the mayor and aldermen *surviving and remaining*, and also for the bailiffs and principal burgesses *for the time being,*

Election of mayor

Election of aldermen.

being, or the greater part of them, in the *Guildhall* aſſembled, *ſo many as they ſhould want of the aforeſaid number of eight* aldermen out of the burgeſſes and inhabitants to elect, &c., who ſhould remain for life unleſs amoved, &c., and ſhould be ſworn into office before the mayor *for the time being*. And it was further granted, that every mayor, if not amoved, ſhould immediately after the execution of his office be an alderman. The plea then ſtated the acceptance of the charter, and that by a ſubſequent charter of *Geo.* 2. dated 19th of *Auguſt* 1747, reciting the former charter, and that the corporation had been under a miſtake in their conſtruction of it relative to the election of the mayor and bailiffs, and that by a judgment of *B. R.* againſt *Richard Tucker*, affirmed in parliament, it had been determined that an alderman, though an inhabitant or burgeſs, was not capable of being elected mayor, which by parity of reaſoning would extend to the election of bailiffs, the King granted for the explanation of the ſame; that the aldermen *for the time being* might be capable of being elected to the reſpective offices of mayor and bailiffs *in the manner preſcribed in the former charter* for the election of a mayor and bailiffs; and that the capital burgeſſes might be capable of being elected to hold the reſpective offices of mayor, aldermen, and bailiffs: which charter was alſo accepted. The plea then ſtated, that ſince the acceptance of the charter of *James* 1. the mayor and aldermen *for the time being, or the major part of them*, have from time to time congregated and aſſembled themſelves together in the *Guildhall*, &c. on the feaſt of *St. Michael*, for the purpoſe of chooſing, and being ſo there congregated and aſſembled, have on that day in each year choſen and nominated four burgeſſes or inhabitants for the purpoſe mentioned in that charter; and that on the feaſt day, &c. the

1803.

The KING *againſt* MORRIS.

Charter of Geo. 2.

1803.

The KING *against* MORRIS.

State of the corporation at defendant's election.

17 perfons of the definite integral parts.

mayor, aldermen, bailiffs, principal burgeffes, and other burgeffes and inhabitants *for the time being, have congregated and affembled themfelves together* in the *Guildhall*, for the purpofe of chufing one of the four fo nominated to be mayor. That at time of the defendant *Morris*'s election to be mayor, *E. T. Steward* was *mayor and alfo an alderman*, and at the fame time there were *eight aldermen* and no more, (*including Steward* the then mayor, and alfo *including S. Wefton*, who was then one of the bailiffs,) and *two bailiffs* (*including Wefton* alfo an alderman), and *eight principal burgeffes* and no more, and an indefinite number of other burgeffes and inhabitants. It then ftated the congregation and affembly of the then mayor and aldermen on the 21ft *September*, 41 *Geo.* 3. for the purpofe of chufing four burgeffes, to the end that one might be chofen mayor, and that being fo congregated and affembled they chofe the defendant *Morris* and three others. That the then *mayor*, and *fix* of the then *aldermen* befides the then mayor, attended and were prefent at that congregation and affembly for the purpofe aforefaid, and voted and acted thereat. That on the fame day the then mayor, bailiffs, principal burgeffes, and other burgeffes and inhabitants duly fummoned, did congregate and affemble themfelves for the purpofe of choofing one out of the four, &c. to be mayor; and on that occafion the then *mayor*, and *feven* of the then aldermen, (*including one* who was the faid then mayor, and *one other* who was one of the then bailiffs,) and the then two bailiffs, and *fix* of the then principal burgeffes, and a large number of the then burgeffes and inhabitants attended the affembly and congregation for the purpofe aforefaid, and voted and acted thereat on that occafion; and the faid mayor, aldermen, bailiffs, principal burgeffes and other burgeffes, &c. being then and there

there congregated and aſſembled for that purpoſe, did, *by the greater part of the voices of them ſo aſſembled together*, chuſe the defendant, being one of the four, &c. to be mayor for the year next enſuing: and ſo he made title to the office.

Replication.

The replication did not traverſe any of the facts ſtated in the plea, and only introduced a further clauſe in the charter of *James* 1., whereby he granted, that if any of the *twenty-four principal burgeſſes for the time being* ſhould die, or be amoved, or depart, it ſhould be lawful to the mayor, aldermen, and other principal burgeſſes *for the time being, or the greater part of them*, to aſſemble and congregate themſelves in the *Guildhall*, and there one other or more others of the burgeſſes or inhabitants in the place or places of him or them ſo dead, &c. to elect, *to fill up the aforeſaid number of twenty four principal burgeſſes*, &c. It then ſtated, that the ſaid mayor, aldermen, and principal burgeſſes having diſregarded the directions of the ſaid charter, and neglected to fill up the number of twenty-four principal burgeſſes by proper elections from time to time as vacancies happened, whereby the number was reduced at the time of the ſuppoſed election of the defendant to *eight* and no more, the ſuppoſed *elective aſſembly* at which the defendant was elected *was not duly conſtituted*, and the defendant *not duly elected mayor*. Concluding with a verification.

Only 8 principal burgeſſes at time of defendant's election.

Demurrer.

To this there was a demurrer, aſſigning for ſpecial cauſes, 1. That the replication attempts to put in iſſue to be tried by the country mere inference and matter of law; viz. Whether the defendant were or were not duly elected mayor, the ſame replication admitting all the facts and circumſtances attending that election as alleged in the plea. 2. That the replication is argumentative, and

1803.

The KING *against* MORRIS.

no certain and fufficient iffue can be taken thereon. 3. That it is in other refpects defective, &c. Joinder in demurrer.

The pleadings were fimilar in the cafe of *Steward*, who was elected mayor the enfuing year.

Templeman in fupport of the demurrers. The replication, which does not traverfe any fact in the plea, or fet forth any new matter, but only fhews how vacancies amongft the principal burgeffes may be filled up, (which is immaterial to the queftion concerning the legality of the election of mayor,) is certainly bad; but the material queftion will arife on the plea, which ftates, that at the time of the defendant's election to be mayor, the principal burgeffes, which ought to have been twenty-four in number, were reduced to eight only; and therefore it will be contended, on the authority of *R.* v. *Bellringer* (*a*) and *R.* v. *Miller* (*b*), that there could be no due election of the defendant for want of a majority exifting of one of the integral parts of the corporation, neceffary to congregate with the reft in the formation of a lawful corporate affembly, by whom fuch election was to be made (*c*). But it is obfervable, that the charter in naming the *principal burgeffes*, always adds, "*for the time being, or the major part of them;*" the natural conftruction of which words muft be taken to be the major part of the *then exifting* principal burgeffes. And lefs inconvenience will enfue from this than from the ftricter conftruction which has prevailed in fome of the cafes; for if no election can be made but by a corporate affembly formed by a ma-

(*a*) 4 *Term Rep.* 810. (*b*) 6 *Term Rep.* 268.

(*c*) The profecutor's counfel intimated, that he fhould make his ftand on this point.

1803.

The KING *against* MORRIS.

jority of each integral part, it will tend, as it has already done in ſeveral inſtances, to the diſſolution of the corporation by the accidental loſs of members before vacancies can be filled up; whereby many preſcriptive burthens of repairing ports, roads, &c. are extinguiſhed, and the benefit loſt to the public. Whereas if it appear that a corporation purpoſely keep down the proper number, the miſchief may be ſoon rectified by application to this court for a mandamus to them to proceed to an election to fill up their body. But whatever the legal interpretation of ſuch words in a charter might be if they ſtood alone, yet here the natural conſtruction of them is aided by other words; for in the clauſe, giving the election of mayor the words, "*for the time being*," are applied to other *burgeſſes* and *inhabitants* of the borough as well as to the *principal burgeſſes*, the former of which being an *indefinite* body, thoſe words muſt neceſſarily have been meant to apply to the major part of the then exiſting body. For the ſame expreſſion cannot be taken to have two different meanings as applied to different words coupled together in the ſame ſentence. And this is ſtill further evinced by the ſubſequent direction given concerning the ſwearing in the mayor elect, which is to be done before the laſt mayor and recorder, in the preſence of "all the aldermen and "principal burgeſſes *for the time being, which ſhould be then* "*preſent*;" plainly interpreting the words "*for the time being*," with reference to the members of the corporation then in fact aſſembled. Beſides, in *R.* v. *Bellringer* (*a*) Lord *Kenyon* did not adopt the conſtruction contended for by either of the parties on the ſtrict, legal, and grammatical ſenſe of the words, but proceeded merely on what he

(*a*) 4 *Term Rep.* 810.

1803.

The King *against* Morris.

thought muſt have been the meaning of the Crown as expreſſed in the charter then under conſideration. It was, beſides, the firſt time when the legal import of the words "*for the time being*" came directly in judgment, and the conſequences of the conſtruction then adopted were not ſo fully developed at that time as they have been ſince. But that thoſe words do not neceſſarily carry the meaning then aſſumed is evident from a prior caſe of *R.* v. *Monday* (*a*); and in the ſubſequent caſe of *R.* v. *Hoyte* (*b*) an election by the major part of the exiſting body, though leſs than a majority of the whole definite number required by the conſtitution, was holden good upon the ground of a uſage to that purpoſe. [*Lawrence* J. That caſe, which which was that of a preſcriptive corporation, went on the ground that the uſage was evidence of a charter in which ſuch a power of election was expreſsly given.] Then as to the caſe of *R.* v. *Miller* (*c*), the original definite body of forty-eight was reduced to nineteen, of whom only three attended the election; and therefore it was unneceſſary to decide whether there ſhould be a majority of each integral part exiſting in order to form a corporate aſſembly: for it was enough there to ſet aſide the election, that a majority of the exiſting body did not attend. It is true, that Lord *Kenyon* there (*d*) referred to *R.* v. *Bellringer* as deciding that there muſt be a majority of each integral definite part exiſting in order to preſerve a corporation: but that is a miſtake; for that caſe did not turn upon any queſtion as to the exiſtence of a majority of an *integral part*, but of the *whole* corporate body. Whereas the whole definite body of this corporation might, by the charter of *George* 2., amount only to thirty-

(*a*) *Cowp.* 530. (*b*) 6 *Term Rep.* 430.
(*c*) 6 *Term Rep.* 268. (*d*) *Ibid.* 278.

two

two perfons, viz. eight aldermen, including the mayor and two bailiffs, and twenty-four principal burgeffes; and here there were feventeen perfons of the exifting definite integral parts, forming therefore a majority of the whole.

1803.
The KING against MORRIS.

Dampier contrà. It is fufficient to invalidate the defendant's election that there was not exifting at the time a majority of the definite body of twenty-four principal burgeffes, without which there could be no legal corporate affembly for any purpofe where that integral part formed a conftituent part of the elective body. Every integral part muft be prefent at a corporate affembly by a majority at leaft of its proper numbers, though the major part of all prefent, when fo affembled, are competent to make an election, without the concurrence of a majority of each particular part. It appears by the replication, that the charter exprefsly requires that upon the death or amotion or non-refidence of any of the twenty-four, the mayor, aldermen, and *other* principal burgeffes for the time being, or the major part of them, fhall elect, &c. *and fill up the aforefaid number of twenty-four principal burgeffes*. There the word *other* is introduced, as defignating, from the neceffity of the occafion, that the election was to be made by the remaining burgeffes: but in all other cafes where the principal burgeffes are mentioned generally, the twenty-four muft neceffarily be meant. Every argument now urged by the defendant's counfel upon the meaning of the words "*for the time being*," was difcuffed in *R.* v. *Bellringer* (*a*), and overruled; and therefore it is unneceffary to do more than refer to that cafe, in which the corporation of *Bodmin*

(*a*) 4 *Term Rep.* 810.

was

1803.

The KING *against* MORRIS.

was holden to be diſſolved. And the judgment in *R.* v. *Miller* (*a*) goes the whole length of this caſe. That turned upon the diſſolution of an integral part, for want of a majority exiſting of its proper number; by reaſon of which the whole corporation was gone, being unable to continuè itſelf.

Templeman, in reply, endeavoured to diſtinguiſh this from the caſes cited by the words, "*for the time being,*" "*or the major part of them,*" being attached and having reference to *inhabitants*, who, being an indefinite number, muſt neceſſarily be underſtood of the major part of thoſe then in exiſtence.

Lord ELLENBOROUGH C. J. No grammatical conſtruction will admit that the words "*for the time being*" ſhould refer merely to the word *inhabitants* as the antecedent laſt named; they muſt certainly refer to all the conſtituent parts of the corporation before named. The only doubt which can be or has been raiſed in this and other caſes is, whether thoſe words do not confine the deſcription to the actually exiſting ſtate of the corporation at the time of the election? but for this there is no foundation. It is clear that "*for the time being*" means no more than hodiernè diurnè. A corporation is a fluctuating body, changing its members from day to day. Certain perſons are firſt named in the charter, on whom the powers are in the firſt inſtance conferred nominatim; as they die, the ſame powers are to be continued to others who ſucceed them. To ſuch the words "*for the time being*" refer in ſucceſſion. The king grants

(*a*) 6 *Term Rep.* 268.

to

1803.

The KING *against* MORRIS.

to *A.*, *B.*, &c., who are named as mayor and aldermen in the charter, certain powers; and then he continues the fame powers to all other perfons who *for the time being* fhall be mayor and aldermen. This is the plain meaning of the words, which obviates all kind of difficulty in the mifconftruction of them as applied only to the exifting majority at the time. The fame words occurred in the cafe of *The King* v. *Bellringer*, and received the fame conftruction. The conveniences and inconveniences of the one or the other conftruction are nearly balanced. Where a corporation confifts of feveral definite integral parts, there muft be a majority of each fuch integral part in order to conftitute a corporate affembly of the whole. It is the fame as if an election were ordered to be made by three diftinct corporations, in which cafe a majority of each corporation muft meet in order to conftitute an elective affembly. Here there did not exift, at the time of the defendant's election, a majority of one of the integral parts of the corporation, namely, the twenty-four principal burgeffes; and therefore the election was invalid.

GROSE J. No folid diftinction can be made between this cafe and that of *The King* v. *Bellringer*. The queftion turns on the intention of the crown, to be collected from the charter; and that intention was, that each integral part fhould be reprefented in the corporate affembly by a majority of its own body; in the inftance of the twenty-four, by the greater part of *them*, that is, of the twenty-four *for the time being*; which means the greater part of thofe perfons who fhould at any future time conftitute the body of twenty-four.

LAWRENCE J. It was plainly the meaning of the crown, in conftituting a definite number of perfons as an integral

1803.

The KING *against* MORRIS.

integral part of the corporation, and requiring an election to be made by the greater part of them assembled with the rest, that a majority of the whole integral part should meet. For it could not be presumed that the corporation would suffer the body to dwindle, but rather that they would keep up their proper number according to the direction of the charter.

LE BLANC J. After the determination in *The King* v. *Bellringer*, eleven years ago, followed up by *The King* v. *Miller*, and considering that the question arises on the face of the record, it would be impossible for the Court to decide in contradiction to those cases, unless stronger arguments were adduced against them than I think can be done. Therefore the only ground left for the defendant was to distinguish, if possible, this case from that of *The King* v. *Bellringer*: but that has not been done. The argument relied on, drawn from the words "*for the time being*," has already received a satisfactory answer from the Court; namely, that the election is to be made by the *natural* body *for the time being*, of whom the different parts of the corporation shall be then properly composed.

Judgment of Ouster.

1803.

Wednesday, June 15th,

DENN, on the Demise of JACKLIN, *against* CARTRIGHT.

A. agrees by parol to sell an estate to *B.* on certain terms, provided *B.* will *continue C.* his tenant, *not for one year only, but from year to year*, (*C.* having just before been let into possession under a contract for the purchase of the estate, which he had failed to pay for in time, and had therefore forfeited his deposit;) and *A.* thereupon agreed to take *C.*'s forfeited deposit as part of the purchase-money: *A.* and *B.* afterwards reduce their agreement respecting the purchase into writing, in which no notice is taken of the stipulation concerning *C.*'s tenancy. Yet held, that this stipulation, being collateral to the written agreement, was binding upon *B*; and that the agreement operated as a tenancy for two years certain at least, though no rent was then mentioned, but was to be settled afterwards; and that the tenancy could not be put an end to at the end of the first year by six months' previous notice to quit.

IN ejectment for a messuage and lands, tried before *Graham* B. at the last *Lincoln* assizes, the demise was laid on the 14th of *May* 1802, and the notice to quit was dated 24th *September* 1801, and served a week before *Old Michaelmas*; and it was to quit the messuage and lands, holden by the defendant of *M. Atkinson*, at the end of the then current year of his tenancy. It appeared that the estate in question originally belonged to *Atkinson*, and was by him contracted to be sold to the defendant *Cartright*, who was let into possession under that contract at *Old May-day* (12th) 1801, and paid 30 *l.* part of the purchase-money, as a deposit for securing the performance of the contract; but not having been able to complete his purchase in time, the 30 *l.* became forfeited. On the 11th of *July* following the lessor of the plaintiff, *Jacklin*, applied, in company with the defendant, to *Atkinson* to purchase the estate. *Atkinson* said there was one condition only on which he would sell to him, which was, *that Cartright should continue tenant, not for one year only, but from year to year*; to which *Jacklin* agreed. The treaty for the purchase was then entered upon and concluded for 550 *l.*, and the agreement reduced into writing, witnessed by *Cartright*; but nothing was mentioned in the written agreement respecting the condition of his continuing tenant. Upon this condition, however, *Jacklin*, who was to have deposited 50 *l.* as earnest of the purchase, not being able to lay down then more than 20 *l.*

M. Atkin-

1803.

DENN *against* CARTRIGHT.

M. Atkinson agreed to give up to the defendant the 30*l.* (*a*) which had been forfeited by him, and let t go in part of the deposit; and *Jacklin* was to pay the interest on the remainder of the purchase-money from the 12th *May* 1801. And a conveyance was afterwards executed from *Atkinson* to *Jacklin*, dated 26th of *September* 1801. Nothing was said at the time of the contract for the sale about the rent which the defendant was to pay for the premises: that was to be left to be settled afterwards by the parties themselves. It was objected that the defendant was not only tenant for a year certain, but to continue as tenant from year to year; so that the tenancy could not be put an end to before the expiration of the second year by any notice to quit: but that at all events the present notice was too soon, as the defendant's tenancy to the lessor of the plaintiff could not be said to have commenced before the 11th of *June* 1801, when the agreement was made between the parties, in consideration of which the seller agreed to give the defendant up the 30*l.* forfeit, and let it go as part of the lessor's deposit. But the learned Judge, considering that nothing which passed in the conversation prior to the written agreement, and not afterwards included therein, could be set up as a collateral and separate lease, or agreement for a lease, particularly as no rent was then agreed for: but that, considering the defendant as tenant from year to year to *Atkinson*, under whom he was first let into possession, the lessor of the plaintiff having purchased from *Atkinson* was entitled to give the defendant the same notice to quit as *Atkinson* himself could have done; and as this notice would have been sufficient from *Atkinson*, the lessor of the the

(*a*) It was said at the bar that the 30*l.* had been since sued for and recovered by *Cartright* from *Jacklin*.

plaintiff

plaintiff was entitled to recover: and the jury found a verdict accordingly. A rule nisi was obtained in the last term for setting aside the verdict and granting a new trial, or entering a nonsuit; aginst which

Balguy and *Clarke* now shewed cause. The defendant was originally put in possession on the 12th of *May* 1801, not as *tenant*, but under a contract as a *purchaser*. At most he was only tenant at sufferance, and not entitled to six months' notice to quit: for when the conversation took place between *Jacklin* and *Atkinson* respecting the defendant's continuing in possession, no rent was fixed, but the terms of his tenancy were to be the subject of future consideration. Supposing the defendant however to have been tenant from year to year to *Atkinson*, by whom he was first let into possession, *Jacklin* who purchased from the other must have the same right to put an end to the tenancy which *Atkinson* himself had, no other time being mentioned at which any new tenancy was to commence: and the defendant having entered on the 12th of *May*, the notice which was served a week before *Old Michaelmas* day was of course sufficient. As to what was said in conversation between *Jacklin* and *Atkinson* concerning the continuance of the defendant as tenant "not for one year only but from year to year," admitting it to operate as an agreement between *Jacklin* and the defendant, still it would only amount to a tenancy from year to year, which must of course enure for one year certain. It meant in effect no more than that the tenancy should enure beyond the year, and so on from year to year, unless put an end to by a regular notice to quit, such as a tenant from year to year is entitled to.

In

1803.

DENN *against* CARTRIGHT.

In *Salk.* 413.(a) it is said to have been ruled by *Holt* C. J. at *Lincoln* in 1699, that a demise for a year and so from year to year does not operate as a lease for two years, unless the second year has commenced. [Lord *Ellenborough.* There is another case in the same page of the book, of *Bellasis* v. *Burbrich* (b), and another in the subsequent page, of *Legg* v. *Strudwick*, which over-rule that opinion: and these latter agree with common experience, that a demise for a year, and so on from year to year, must enure as a tenancy for at least two years: and so it is declared to be by Mr. Just. *Buller* in *Birch* v. *Wright* (c), where he considers the cases in *Salkeld.*] In *Legg* v. *Strudwick*, not only the second but the third year had commenced: and there the words *et sic ultra*, &c. imply more strongly than these a continuance at all events beyond the first year. But supposing that such an agreement substantiated would at all events enure for two years, yet there was no evidence that such was the final agreement of the parties; for the terms were afterwards reduced into writing, and no such stipulation was there mentioned. And even if it had, yet the agreement being between *Jacklin* and *Atkinson*, to which the defendant was no party, it would not affect *Jacklin*'s right to recover the land, though it might give *Atkinson* a cause of action against him for the breach of the condition on which he agreed to sell to him.

Vaughan Serjt. and *Reader* contrà. The cases referred to by the Court in *Salkeld* are decisive of the legal construction of this agreement: and the lessor was bound by it, though not afterwards included in the written agreement;

(a) S. C. *Holt's Rep.* 414. (b) S. C. 1 *Lutw.* 213.
(c) 1 *Term Rep.* 380.

for

1803.

DENN against CARTRIGHT.

for this latter concerned the purchaser and seller only, and was collateral to the parol agreement for the tenancy, which was the inducement to *Atkinson* to agree to sell to the lessor; and in consideration of which *Atkinson* consented to let the 30*l.* deposit forfeited by the defendant go in part of the purchase-money. They were then stopped by the Court.

Lord ELLENBOROUGH C. J. The agreement respecting the tenancy was perfectly collateral to the written agreement for the purchase. The defendant was to continue tenant to *Jacklin* not for one year only, but from year to year. This must enure as a demise for two years at least. The notice to quit acknowledges a tenancy; for it is to quit at the end of the present current year *of your tenancy*. Then the only question remaining is, Whether there may not be a tenancy without a specific agreement for a certain quantum of rent? But the rent was to be ascertained afterwards; and if that were not done, the lessor might recover upon a quantum meruit.

Rule absolute.

1803.

Tuesday, June 14th.

THOMPSON *against* ROWCROFT.

A ship-owner having first insured his ship with *A.* &c. and his freight with *B* &c., for a certain voyage, and having notice of an embargo laid on the ship in a foreign port, abandons the ship and freight to the respective underwriters, and receives from them the whole amount of their subscriptions as for a total loss of both; first undertaking, by a memorandum on the *ship* policy, to assign to the underwriters thereon his interest in the ship, and to account to them for it, and afterwards undertaking, by a similar memorandum on the *freight* policy, to assign to those underwriters all right of recovery, compensation, &c. The ship being afterwards liberated, and earning freight, which was received by the assured; held, that however the question of priority as to the title to the freight might have been as between the different sets of underwriters litigating out of the same fund, and however the weight of argument might preponderate more in favour of the underwriters on the ship, yet that the assured, who had received the freight from the shippers of goods, was at all events liable on his express undertaking to pay it over to the underwriters on freight; and that, without deducting the expences of provisions, wages, &c. which were charges on the owner before the abandonment, and on the underwriters on ship afterwards.

THE declaration stated, that on the 3d of *September* 1800 the defendant, being owner of three-fourths of the ship *Theseus*, and being the husband and sole manager of the ship, chartered her to one *S. Sanders*, to proceed to *Riga* for a quantity of masts, &c., to return therewith to *Portsmouth*, and for which freight was to be paid at a certain rate per load for different goods, and also certain demurrage in case of detention for loading or unloading beyond a certain time.' That on the 3d of *October* 1800 the defendant, for himself and as agent, caused the freight of the said ship to be insured at and from *Riga* to *Portsmouth* for 1400*l.*, and that the plaintiff underwrote the policy to the amount of 150*l.*, and became an insurer to the defendant to that amount upon the said freight on the said voyage. That the ship proceeded to *Riga*, and on her arrival there certain persons on behalf of *S. Sanders* proceeded to load on board her, and had nearly completed her cargo, when, on the 7th of *November* 1800, the ship *was arrested, restrained, and detained* by the *Russian* government at *Riga*, and the cargo was unladen and kept under the authority of the same government; and that upon intelligence of the said loss arriving in *London*, the defendant on the 11th of *February* 1801 applied to the plaintiff as such insurer, and to the other underwriters on

the

1803.

THOMPSON *against* ROWCROFT.

the policy, and required them to pay their reſpective inſurances as and upon a total loſs occaſioned by the means aforeſaid, and then and there *abandoned to them the intereſt in the freight* inſured, as far as their ſubſcriptions on the ſame extended; and payment of the loſs was thereupon agreed to be made within one month: thereupon, in conſideration of the premiſes, and that ſuch payment of the loſs ſhould be made as aforeſaid, the defendant undertook and promiſed the plaintiff, on ſuch payment being made, *to aſſign all right of recovery and compenſation of and in the freight*, as abandoned to the plaintiff, to one *W. D.* and the ſaid defendant, in proper form, for the benefit of the underwriters, &c. That payment of the loſs was duly made to the defendant. That afterwards, on the 29th of *May*, the arreſt, reſtraint, and detainment of the ſaid ſhip at *Riga* was withdrawn by the *Ruſſian* government, and the ſhip and cargo liberated, and the cargo put on board the ſhip, and the ſaid ſhip with her cargo proceeded on her ſaid voyage from *Riga* to *Portſmouth*, and delivered her cargo at *Portſmouth* to *S. Sanders*; and the defendant thereupon received the freight of the ſame to the amount of 1857 *l.* 12 *s.*, and that the plaintiff's intereſt therein was 150 *l.*; whereof the defendant had notice: yet that the defendant has not made any aſſignment for the benefit of the underwriters on the ſaid freight, nor paid the intereſt of the plaintiff in the ſame ſo by the defendant received as aforeſaid, &c. There was another ſpecial count to the ſame effect, and alſo counts for money had and received, and upon an account ſtated. The defendant pleaded non aſſumpſit. And the following particulars of the plaintiff's demand were delivered under a Judge's order. "This action is brought by the plain- "tiff (who was an underwriter for the ſum of 150 *l.* on

 "the

1803.

THOMPSON *against* ROWCROFT.

"the freight of a ship called the *Theseus*, insured on a "voyage at and from *Riga* to *Portsmouth*, on which poli-"cy the plaintiff has paid a total loss, and the defendant "has since received the freight insured) to recover the "sum of 150*l.* with interest thereon from the defend-"ant." The cause was tried before Lord *Ellenborough* C. J. at the sittings at *Guildhall* after *Michaelmas* term 1802, when a verdict was found for the plaintiff, subject to the opinion of the Court on the following case: with liberty for either party to turn the special case into a special verdict.

On the 3d of *September* 1800 the defendant, being owner of three-fourths of the ship *Theseus*, and being the ship's husband, and having the sole management of her, chartered her to *Sanders* to proceed to *Riga* for a cargo of round masts with timber and logs for stowage, with which she was to return to *Portsmouth*, and for which freight was to be paid at the rate of 5 *l.* 1 *s.* per load for round masts, and 4*l.* for logs and timber, one half on delivery of the cargo, and the remainder in four months: thirty running days allowed for loading at *Riga*, and twenty-five days for unloading at *Portsmouth*, with ten days demurrage at each place, at 10 *l.* per day. On the 10th and 16th of *September* 1800 the defendant caused policies of insurance to be effected on the three-fourth parts of the ship, valued at 2400 *l.*, at and from *Portsmouth* to *Riga* and *Portsmouth*, and which policies were underwritten to that amount. On the 31st of *October* 1800 the defendant for himself, and as agent, caused a policy of insurance to be effected on the freight, at and from *Riga* to *Portsmouth*, for 1400 *l*, of which 1000 *l.* was declared to be on his three-fourths, and the remaining 400 *l.* on the other fourth. On this policy the plaintiff

1803.

THOMPSON *against* ROWCROFT.

was an underwriter on the freight for 150*l.* The value of the ſhip was 3200*l.*; of the freight 2200*l.*; and there was no other inſurance on ſhip or freight. The ſhip failed from *Portſmouth*, the captain having orders from the freighters to apply to Meſſrs. *Cumming*, *Fenton*, and Co. at *Riga* for his cargo, and arrived at *Riga*, and on her arrival was ſupplied by *C.*, *F.*, and Co. with a cargo, almoſt the whole of which ſhe had taken on board, when, on the 7th of *November* 1800, *an embargo* was laid by the *Ruſſian* government on all *Britiſh* ſhips then in the port of *Riga*. On the 29th of *November* the captain and crew were taken out of the ſhip, and marched under a *Ruſſian* guard 150 miles up the country to *Dorpat*, where they were detained *as priſoners* till *May* 1801. The ſhip was taken poſſeſſion of by the *Ruſſian* government, and the part of the cargo which had been put on board was unladen and put into warehouſes belonging to that government. Upon intelligence of theſe circumſtances arriving in *England* the defendant applied to the reſpective underwriters on the ſhip and freight, and received of them the amount of their reſpective ſubſcriptions *as for a total loſs*: and the following indorſements were made on the reſpective policies, viz. On that on the *ſhip*, "agreed to "ſettle a total loſs of 100*l.* per cent., the ſhip being "detained and ſeized at *Riga*, and the owners to account "to the underwriters for the ſhip, if reſtored to or re-"ceived by them, or to make, at the expence of the "underwriters, a proper aſſignment of their intereſt in "proportion to the ſums inſured. *London*, 19th *January* "1801." And on that on the *freight*, "The intereſt "in the freight inſured by this policy being abandoned to "the underwriters as far as their ſubſcriptions on the "ſame, and payment of the loſs being agreed to be made

1803.

THOMPSON *against* ROWCROFT.

"in one month as customary, it is agreed, on such pay-"ment being made, to assign all right of recovery, com-"pensation, &c. &c. to Mr. *Henry Thompson*, Mr. *William* "*De la Cour*, and Mr. *Thomas Rowcroft*, in proper form "and manner as in similar cases for the benefit of the "underwriters and assured, according to their interest re-"spectively. *London*, 11th *February* 1801." And the defendant also signed the following agreement. "*Lon-*"*don*, 19th *January* 1801. In consideration of the un-"derwriters on a policy for 2200 *l.* No. 9. 11th *Septem-ber* 1800, having accepted an abandonment of the ship "*Theseus*, (Captain *Wm. Reynolds*,) detained and seized "at *Riga*, and insured by said policy, and having agreed "to pay a total loss thereon, I do hereby promise on pay-"ment of the same to make over to them or their assigns, "at their expence, an assignment in a reasonable and "proper form of their interest and proportion of the "same. Signed *Thomas Rowcroft*." No assignment has been executed either of the freight or ship. On the 29th of *May the embargo* was taken off, the captain and crew were marched to *Riga*, and restored to the possession of their ship. The part of the cargo which had been unladen was re-laden; the cargo was completed and brought to *Portsmouth*, and the defendant received freight according to the terms of the charter-party to the amount of 1857 *l.* 12 *s.* 6 *d.*, but no demurrage. The plaintiff has called upon the defendant to make an assignment for his benefit according to the abovementioned indorsement made on the policy on freight, and to pay him 150 *l.* and interest; but the underwriters on the ship insist that they are entitled to the freight, and have given the defendant notice of such claim: he does not therefore think himself justified in paying the plaintiff without the sanction of a court.

If

If the Court ſhall be of opinion that the underwriters on the freight are entitled to recover, the defendant contends that he is entitled to deduct from the ſum received a proportion of the expences incurred in conſequence of the ſeizure and detention, and of the expences of the navigation of the ſhip from *Riga* to *Portſmouth*: and if the Court ſhall be of opinion that he is entitled to ſuch deduction, it is agreed that the amount ſhall be referred. Either party ſhall be at liberty to apply to the Court for leave to turn the ſpecial caſe into a ſpecial verdict, to which the other ſhall conſent. The queſtion for the opinion of the Court was, Whether the plaintiff were entitled to recover any and what part of the freight, and ſubject to what deductions, if any? If the Court ſhould be of opinion that he was ſo entitled, the verdict for the plaintiff to ſtand, and the damages to be entered for ſuch ſum as the arbitrator, conforming himſelf to the opinion of the Court as to the deductions to be made, ſhall direct. If the Court ſhould think that the plaintiff was not entitled to recover any part of the freight, the verdict to be entered for the defendant.

This caſe was firſt argued in laſt *Eaſter* term by *Jervis* for the plaintiff, and *Gaſelee* for the defendant; and again in this term by *Erſkine* for the plaintiff, and *Gibbs* for the defendant. The argument turned at firſt upon a conſideration of the caſe as it would ſtand, taking the defendant to be a mere ſtakeholder, and the queſtion to ariſe between the underwriters on the *ſhip*, and thoſe on the *freight*. But at the recommendation of the Court the ſecond argument was narrowed to the conſideration of the queſtion upon the ſpecific agreement between the plaintiff and the defendant, on which ground alone the Court decided the caſe.

1803.

THOMPSON *against* ROWCROFT.

On the firſt view of the caſe, the arguments for the plaintiff were in ſubſtance theſe. Freight being the diſtinct ſubject of inſurance by our law (though not by the law of *France*), it follows, that it may be abandoned to the underwriter on freight, and does not follow the abandonment of the ſhip to the underwriter on the ſhip (*a*). The contract of the aſſured with the underwriter on ſhip, and that with the underwriter on freight, are of different ſorts. The underwriter on ſhip only engages to be reſponſible in value as far as the body, apparel, and tackle of the ſhip may ſuffer from the perils inſured againſt: and theſe he inſures not only from average but from total loſſes in two ſenſes; one where the ſubject matter is itſelf deſtroyed; the other if the voyage or adventure be loſt, though the body of the ſhip be ſafe; in which caſe the aſſured may abandon the ſhip itſelf to the underwriter. But here, inaſmuch as the latter would not be bound to make good any collateral or conſequential loſs, ſuch as freight, or the expected profits of the voyage, ſo neither can he juſtly claim the benefits of ſuch collateral contracts for the voyage, having paid no conſideration for them. He knows, that by the law merchant freight is an object of diſtinct inſurance, and conſequently he muſt know when he ſubſcribes the policy, that the riſk or benefit of the freight is not within the contemplation of the party with whom he contracts for the inſurance of the ſhip, and that any abandonment to him of the body of the ſhip will be with an implied reſervation of the freight, the inchoate right to which may have accrued before ſuch abandonment. On the other hand, the underwriter on freight does not engage for any damage to the ſhip, nor

(*a*) Vide *Marſhall on Inſurance*, 2 vol. 520.

for

1803.

THOMPSON *against* ROWCROFT.

for the ſolvency of the owner of the goods, nor of the party who hires the ſhip on freight; but he only undertakes that the perils of the ſea ſhall not intervene to prevent the owner from having a right to recover what ſhall be due to him for freight from others for the uſe of his ſhip, or the carriage of their goods. It may become doubtful whether freight will be earned, though the ſhip may be ſafe; and while it is in dubio the aſſured may abandon to the underwriter on freight without abandoning his ſhip; and the right of ſalvage to the underwriter follows the right of abandonment by the owner. The contracts therefore with the different ſets of underwriters are ſufficiently diſtinct in their nature and in common practice. Here though the policy on the ſhip was firſt effected, yet the policy on the freight was made before the abandonment to the underwriter on the ſhip, and while the owner had a diſtinct intereſt in the ſubject matter. It is true that the owner is not entitled to receive the freight till the arrival of the ſhip at the port of diſcharge; but an inchoate right to it exiſts, which is the ſubject of inſurance, from the beginning to load the goods (*a*) on board, or from the ſailing of a chartered ſhip (*b*) upon the voyage inſured. *The embargo*, ſo called in the caſe, of the *Ruſſian* government, and having all the characteriſtics of an embargo, and not of a capture or final ſeizure and condemnation, which took place on the 7th of *November* 1800, could not terminate the contract of affreightment any more than the contract for mariners' wages: neither could the ſubſequent abandonment. The original contract for freight, the inchoate right to which had attached prior to ſuch abandonment, ſtill ſubſiſted,

(*a*) *Montgomery* v. *Eggington*, 3 *Term Rep.* 362.
(*b*) *Thompſon* v. *Taylor*, 6 *Term Rep.* 478.

and

1803.

THOMPSON *against* ROWCROFT.

and was only perfected by the arrival of the ſhip. In *Hadley* v. *Clarke* (*a*) an embargo on a *Britiſh* ſhip by the government in a *Britiſh* port, though for above two years, was holden not to diſſolve the contract between the ſhip owner and the ſhipper of the goods. Lord *Kenyon* ſaid, that if it could put an end to ſuch a contract, it would operate equally to annul all contracts for freight and for wages. And though in *Touteng* v. *Hubbard* (*b*) an embargo by our government on a *Swediſh* ſhip in one of our ports, (which continued till the object of the voyage was loſt,) was deemed to diſſolve the contract between the *Swediſh* owner and the *Britiſh* charterer: yet that turned on a ground of ſtate policy, in order to prevent *Sweden* from availing itſelf of its own act of aggreſſion, in return for which the embargo was laid. And Lord *Alvanley*, in giving judgment, excepted the caſe of ſuch an embargo laid by a third foreign power. In the caſe of *Green* v. *Young* (*c*), there referred to, the queſtion aroſe between two *Britiſh* ſubjects, on which his lordſhip reſerved giving any opinion. The caſe of *Fiſher* v. *Ward* (*d*), which was an action by a mariner for wages during the detention of the ſhip under this embargo, turned ultimately on the ſpecial contract with the maſter. Many caſes have occurred where the queſtion has been, Whether a capture put an end to the contract for wages: but they have all turned on this, Whether freight became due for the entire voyage, or for certain proportional parts? If the ſhip be totally loſt or

(*a*) 8 *Term Rep.* 259. 265. (*b*) 3 *Boſ. & Pull.* 291.

(*c*) 2 *Ld. Ray.* 840.

(*d*) The firſt trial of this caſe took place at *Weſtminſter*, on the 18th of *February* 1802, before Lord *Alvanley* in *C. B.*; the ſecond trial on the 14th of *June* 1802. Theſe trials, together with what paſſed in Court on the motions for new trials, are publiſhed in a pamphlet, intitled "*Ruſſian* Embargo Caſes."

captured

THOMPSON *against* ROWCROFT.

captured during the progrefs of the voyage, or fuch part of it on which freight is to become due, then the contract for wages is put an end to with it. *Anon.* 1 *Sid.* 179. *Wiggins* v. *Ingleton* (*a*), *Chandler* v. *Meade* (*b*), *Hernaman* v. *Bawden* (*c*), and *Yates* v. *Hall* (*d*). But in *Molloy*, *b.* 2. *c.* 4. *f.* 13. it is faid, that if a fhip be taken in the courfe of her voyage, and afterwards recaptured and reftitution made, and fhe proceed on her voyage, the contract is not determined. And that a temporary detention does not put an end to the original contract for wages, appears from the cafe of " *Pratt* v. *Cuff* (*e*), at the Sittings at *Guildhall* after *Hilary* term 1798, before Lord *Kenyon*; which was an action of affumpfit, brought to recover the fum of 36 *l.* 17 *s.* 8 *d.* for the wages of the plaintiff, as captain of a floop belonging to the defendant. On the 26th of *April* 1796 the veffel failed in ballaft outward, on a voyage from *London* to *Embden*, where fhe was to obtain *Pruffian* colours, in order to protect her from capture by the *Dutch*. On the 5th of *May* 1796 the veffel entered the river *Ems*, (which divides the *Pruffian* from the *Dutch* dominions,) and, in failing up the river in her way to *Embden*, was, on the fame day, captured by the *Dutch*, and carried to *Delfziel*, where the plaintiff and the reft of the crew were made prifoners, and confined on board a prifon fhip for feven months, and afterwards removed to *Haerlingen* prifon, and confined there until the 23d of *January* following, when the veffel was releafed, together with the plaintiff and his crew. The plaintiff then proceeded with the floop and her crew on her voyage to *Embden*, where he obtained *Pruffian* colours, and afterwards procured a cargo of butter, with which he returned

(*a*) 2 *Ld. Ray.* 1211. (*b*) *Ib.* (*c*) 3 *Burr.* 1844.
(*d*) 1 *Term Rep* 73. (*e*) This was cited from a MS. note.

1803.

THOMPSON *against* ROWCROFT.

to *London*. The defendant paid into court the amount of the plaintiff's wages for the voyage, exclusive of the time he was in prison under capture. And at the trial the jury found a verdict for the plaintiff for the further sum of 36*l*. 17*s*. 8*d*., being the amount of the plaintiff's wages for the time of his imprisonment; subject to the opinion of the Court, Whether, under the above circumstances, the plaintiff were entitled to recover? If he were, then the verdict was to stand; if not, then a nonsuit was to be entered. Upon this case coming on for argument in *Trinity* term 1798, *Lawrence* J. suggested that it should have been found whether freight had or had not been received by the defendant: and the cause went down to a second trial to have that fact found, which being found in the affirmative, at the Sittings after *Hilary* term 1799, Lord *Kenyon* then expressed so strong an opinion for the plaintiff that the case was never afterwards moved by the defendant." Supposing the owner here had stood his own insurer of the freight, the case would have been the same as that of *Luke* v. *Lyde* (*a*). That was a capture and recapture, and the shipper received his goods again on payment of salvage, and the owner, who had insured his ship, but not his freight, had abandoned to the underwriters, and afterwards brought his action for the freight pro ratâ, and recovered; though it was objected that he was precluded of his action by the abandonment. [*Le Blanc* J. That was freight already earned at the time of the abandonment.] If the freight here had been made payable by certain instalments, the question might have been different as to those which accrued during any period of the voyage subsequent to the abandonment to the underwriters on the ship; but here the contract for freight

(*a*) 2 *Burr*. 882.

1803.

THOMPSON *against* ROWCROFT.

was entire, and cannot be apportioned: the right to it commenced on the loading of the goods on board before the embargo and abandonment, though liable to be defeated afterwards upon failure of delivery. The underwriter on the ſhip, who takes it as aſſignee, muſt take it ſubject to all the contracts of the original owner, who before that time had authority to pledge the ſhip in part or in the whole; and the owner could only abandon to the underwriter on the ſhip the right which he himſelf then had. Freight may either be recovered on the original title under the charterparty where the whole contract is performed, according to *Cook* v. *Jennings* (*a*), or in aſſumpſit for the ſervice performed pro ratâ, as in *Luke* v. *Lyde*: now here it was received, as the caſe itſelf ſtates, according to the terms of the *charter-party*: and in *Da Coſta* v. *Newnham* (*b*), where a claim of freight (collateral to the principal queſtion) was made by the underwriters on the ſhip, (to whom the owner had offered to abandon, and who were afterwards called upon for a total loſs,) *Aſhhurſt* J. ſaid, "As to the freight claimed by the defendant, he was the inſurer of the *ſhip*, and not of the *freight*; and therefore there is no ground for making a reduction of the freight before the ſhip got to *Nice*." *Nice* was the place where the ſhip was ſtopped by diſtreſs, and offered to be abandoned, and where the expences were incurred which were the ſubject of diſpute. But

Secondly, The plaintiff is at any rate entitled to recover in this action. For, ſuppoſing the prior abandonment by the defendant to the underwriter on the ſhip to carry with it all the collateral right to the freight in this caſe, then the ſubſequent abandonment to the plaintiff of the

(*a*) 7 *Term Rep.* 381. (*b*) 2 *Term Rep.* 412.

freight

1803.

THOMPSON *against* ROWCROFT.

freight after the defendant had abandoned it to another, without notice of such prior abandonment, was a fraud upon the plaintiff, and the money paid by the plaintiff as upon an abandonment of the freight was paid in his own wrong and without consideration, and if this had been disclosed to him at the time he would have resisted the abandonment. By abandoning the freight to the plaintiff, and receiving from him the value of it, the defendant engaged that the plaintiff should stand in his shoes and be entitled to all the freight which the ship should earn in that voyage. Then when the ship actually earned the freight and the defendant received it, it was money had and received to the use of the plaintiff, be the question what it may as between the defendant and the underwriter on the ship. The ship has performed the condition which the underwriter on the freight stipulated for, and the freight has been paid: therefore except for the abandonment to him, which he could not resist when the event was in doubt, he was not bound by his contract to have paid any thing: but having been obliged to accept the abandonment and pay the money then, he has a clear right to recover it back now, either eo nomine as freight since received for his use to whom it was abandoned upon a direct undertaking by the defendant to pay it when received, or as so much money paid by the plaintiff without consideration, and upon a condition which has become nugatory and has failed by the defendant's own act, by which the plaintiff ought not to be prejudiced: for it is clear that but for the defendant's having abandoned to the underwriter on the ship without reserving the freight the plaintiff would have been entitled to recover in this action. This mode of considering the case is independent of the question as between the two

sets

1803.

THOMPSON *against* ROWCROFT.

ſets of underwriters; and the ſame concluſion will follow whether the freight be due in this caſe under one entire and original contract, or upon the ground of equitable conſideration alluded to by Lord C. J. *Eyre* in *Curling* v. *Long* (a).

Arguments for the defendant on the firſt ground. The embargo, which was of an hoſtile nature, put an end to the original contract for freight, and the freight earned after the abandonment was upon a new contract with the underwriters on the ſhip, who were then become the owners. There is a great difference in the nature of the thing between a friendly and a hoſtile embargo, the latter of which is tantamount to a capture at the time, though reſtoration may follow afterwards. An embargo is a ſimple detention of the veſſel and crew in ſtatu quo for a particular purpoſe, in its nature temporary. But this, however doubtful it might have been in its inception, became for a time a hoſtile capture when the *Ruſſian* Government made priſoners of the *Britiſh* ſeamen, diſcriminating between them and the *foreign* ſeamen in our ſervice, who were liberated. The ſhips alſo were ſeized by the Government, and the goods unladen and put in warehouſes belonging to the Government; and the whole was conſidered as a hoſtile ſeizure of the *Britiſh* ſhips and property. This was the view in which two of the Judges conſidered this tranſaction in the caſe of *Beale* v. *Thompſon* (b) in *C. B.*, with whom a third, who expreſſed his doubts, finally concurred in giving judgment for the defendant, the maſter, againſt a claim by a mariner for wages during the embargo. This deciſion ſuſpends at leaſt the authority of *Pratt* v. *Cuff*, before Lord *Kenyon*. And the ſame principle muſt neceſſarily apply to the annulling

(a) 1 *Boſ. & Pull.* 637. (b) 3 *Boſ. & Pull.* 405.

1803.

THOMPSON *against* ROWCROFT.

nulling the original contract for freight, which distinguishes this case from that of *Hadley* v. *Clarke* (*a*), where the embargo laid on was merely precautionary, and not by way of hostility. The case of *Luke* v. *Lyde* (*b*) was in assumpsit, and not on the charterparty, which shews that the freight was earned on a new contract pro ratâ itineris, and not under the original contract. And such was the opinion of Lord C. J. *Eyre* in *Curling* v. *Long* (*c*), where he says, that where a ship, after capture and recapture, completes her voyage, and the shipper has his goods, "though the original contract be done, a meritorious consideration arises, which entitles the master to a recompence; not, however, on the foot of the old contract, but on a new contract which springs out of it." Then, if the freight were earned under a new contract, subsequent to the abandonment to the underwriter on the ship, by which he was placed in the situation of owner, the plaintiff cannot be entitled to recover it, and the subsequent abandonment is inoperative, there being no salvage. But however the question concerning the continuance of the original contract after such an embargo may be as between the ship owner and shipper of goods, or the master and mariners, if the owner's right to the ship remained in statu quo, it cannot vary the case as between the different sets of underwriters. The legal owner or assignee of the ship must necessarily be entitled to all the future earning of it after he became such, as he is liable to all future outgoings. And the question, for whom the defendant, who has received the money for the freight, is trustee, must depend upon the question, Who was the legal owner at the time of the service performed in re-

(*a*) 8 *Term Rep.* 259. (*b*) 2 *Burr.* 882. (*c*) 1 *Bos.* & *Pull* 637.

spect

spect of which such money became due? in considering which it is necessary to revert to the original contract between the owner and the underwriter on the ship; and to ascertain what interest the former undertakes to abandon to the latter in abandoning the ship. This interest cannot be broken in upon by any subsequent contract which the owner makes with the underwriter on freight, and which may collaterally affect the ship itself. Such subsequent contract cannot entitle the underwriter on freight to the earnings of the ship after the owner has parted with the property in her, however it might give him a remedy in damages against the owner for the breach of a special contract. The underwriter on freight, who contracted with the owner subsequently to his contract with the underwriters on ship, cannot stand in a better situation than the owner himself; and it is clear that as between such owner and the underwriter on the ship after abandonment the latter would be entitled to the freight. Abandonment is no other than the assured's election to convert a dubious risk into a total loss. He compels the underwriter, under this disadvantage, to purchase the property for the full value insured, and thereby puts him into his place for all chances, favourable or otherwise. The chance of freight is one ground of the calculation made by the assured at the time in considering whether or not he will abandon. The assured could not have received more if the ship had been totally lost. The underwriter purchases the right of having it so considered as between them, with the benefit of salvage. Then the assured, who has received compensation as for a total loss, cannot be in a better situation than if a total loss had happened: nor is it reasonable or just that the underwriter on the ship, who, in addition to paying the full value of it as for a

1803.

THOMPSON against ROWCROFT.

1803.

THOMPSON *against* ROWCROFT.

total loſs, incurs the expence and riſk of all future contingencies and dangers, ſhould not be entitled as well to the earnings of the ſhip. While any profit can be derived to the aſſured from the future uſe of the ſhip it cannot be deemed a total loſs; and yet he can only exerciſe the right of abandonment upon the preſumption in law that the exiſting circumſtances are equivalent to a total loſs. Some voyages, ſuch as thoſe to the *Eaſt Indies*, may laſt two or three years: the ſhip may be ſtranded at the commencement of her outward-bound voyage, and be in ſuch peril as to warrant an abandonment: if then the owner, electing to abandon, receive payment from the underwriter on the ſhip as for a total loſs, it cannot be contended that, by having alſo inſured his freight, he would be entitled to the uſe and profit of the ſhip for three years longer. After an abandonment the underwriters on ſhips are not bound to purſue the voyage contracted for at their own riſk and expence without any compenſation; for a contract of this nature is not like a mortgage, which binds the land, but is perſonal, and only binds the owner who made it. But ſuppoſing the previous contracts of the aſſured with the ſhippers of goods would in equity bind the underwriters after an abandonment to purſue the voyage, if practicable, the ſame equity would transfer to the latter the benefit as well as the burden of thoſe contracts. At any rate, however, if the abandonment to the underwriter on the ſhip would not entitle him to receive the freight as againſt the underwriter on freight, to whom it was ſpecifically abandoned, yet the latter, ſtanding in the place of the owner, would only be entitled to the balance of the freight after deducting thoſe charges which the owner himſelf would have had to defray out of the freight, ſuch as the ex-

pences

1803.

THOMPSON *against* ROWCROFT

pences of provifions, feamen's wages, &c., which have no relation to the body of the fhip, and confequently no part of that which the underwriter on the fhip undertook to infure, according to *Robertfon* v. *Ewer* (*a*).

In reply it was infifted, that the temporary detention of the fhip by the *Ruffian* Government was an *embargo* properly fo called, as ftated in the cafe, and not a *capture*, which latter was always underftood where the fhip was either taken as prize jure belli, or by way of confifcation for laws broken. In thofe cafes, the property was abfolutely devefted out of the former owners, and vefted in the capturing or confifcating State, and not capable of vefting again in the original owner except by recapture, fubject to falvage. That, taking the whole of this proceeding together, the character of it was no more than an *embargo*, a detention for a time concluded by a voluntary releafe. That the manner of it was indeed attended with circumftances more than ufually aggravating, and, to the individual mariners, injurious; but at no period of it did the *Ruffian* Government, by any judgment of a court or other authentic act, affume to themfelves the right of property, either as prize or by way of confifcation. That embargoes were laid on from different motives, either friendly, politic, or precautionary with a view to future hoftility in certain events. Thefe latter may end in condemnation or confifcation; but, till condemned or confifcated, the right of property ftill remains in the original owners. But if releafed at laft by the feizing State, the event teftifies the nature and character of the detention, and denominates it an *embargo*.

At the conclufion of the defendant's counfel on the fecond argument,

(*a*) 1 *Term R p*. 127.

 Lord

1803.

THOMPSON *against* ROWCROF.

Lord ELLENBOROUGH C. J. ſaid, If the rights of the reſpective ſets of underwriters on the ſhip and on the freight claſhed in this caſe, and it had been a queſtion of priority between the two, who were litigating for payment out of the ſame fund, I ſhould have gone with the defendant's counſel in a great part of their argument; but here the litigation is by one of the ſets of underwriters with the aſſured, who has made a ſpecific contract with each of them, by which he muſt be bound. And therefore, in my preſent view of the ſubject, the right of property in the ſubject-matter may be in the underwriters on the ſhip, and yet the defendant may be liable to the underwriter on the freight in this action. The plaintiff contracted with the defendant to inſure his freight: an event happened which entitled him to abandon it to the plaintiff: The plaintiff accepted the abandonment, and has paid the defendant as for a total loſs of the freight. The defendant has ſince received the freight; and yet he refuſes to pay it over to the plaintiff in purſuance of his undertaking. To be ſure he is liable.

It was then ſuggeſted by the defendant's counſel, that at leaſt he was entitled to deduct the expences of the voyage, ſuch as wages, proviſions, &c. which were in the nature of ſalvage on the freight.

Lord ELLENBOROUGH C. J. The defendant has received the entire freight, and therefore he muſt pay it over. The underwriters on the ſhip, from the time of the abandonment to them, ſtand in the ſame ſituation as the owner; and as the owner was liable to all theſe expences before, ſo, after the abandonment, they muſt be borne by the underwriters on the ſhip. Expences of this ſort are not, properly ſpeaking, ſalvage on the freight, but they

are

are charges paid by the owner of the ſhip for the benefit of thoſe to whom he abandoned it. And therefore he will be entitled to retain a proportionable part on his ſettlement with them.

1803.

THOMPSON *againſt* ROWCROFT.

Per Curiam, Poſtea to the Plaintiff.

CALL, Bart. *againſt* DUNNING.

Tueſday, June 14th.

The anſwer of the obligor of a bond to a bill filed for a diſcovery, in which he admitted the bond to have been executed by him, is only ſecondary evidence, and cannot be received as evidence per ſe of the execution, without ſhewing that due diligence had been uſed to diſcover who the ſubſcribing witneſs was, who was alleged to be unknown.

IN debt on bond, at the trial before Lord *Ellenborough* C. J., at the Sittings after laſt term, the only proof offered of the execution of the bond was the anſwer of the defendant in Chancery to a bill filed for a diſcovery, Whether this were his bond? in which anſwer it was admitted to be ſo. But the bond, when produced, having the name "*Richard Wilſon*" ſubſcribed thereto as the witneſs atteſting the execution, and no evidence being given of his hand-writing, or that any inquiry had been made who the perſon was, or where he was to be found, or that any application had been made to any perſon of that name to know whether he were the ſubſcribing witneſs; (though it was ſuggeſted on the part of the plaintiff that no knowledge of the witneſs could be obtained by him;) the Lord Chief Juſtice thought that no ſufficient foundation had been laid to let in the ſecondary evidence offered, and therefore nonſuited the plaintiff.

Gibbs moved to ſet aſide the nonſuit, on the ground that this was diſtinguiſhed from all the prior caſes where evidence of the defendant's admiſſion that it was his bond, without calling the ſubſcribing witneſs or proving his hand-writing if dead, had been rejected: For in thoſe caſes the parties might have made ſuch admiſſion by ſurprize. And the Courts have always conſidered the evi-

 dence

1803. CALL, Bart. against DUNNING.

dence of the fubfcribing witnefs material, if it can be obtained, in order that a defendant may have the advantage of a difclofure being made of all the circumftances attending the execution of the inftrument at the time. But here the defendant himfelf had the opportunity of ftating, together with the acknowledgment of his handwriting, every accompanying circumftance of the tranfaction which he thought material for him; and therefore he cannot be hurt by letting in his own account of the fact: more efpecially when his attention was particularly called to the object by the bill filed for a difcovery, the profeffed object of which he muft know was to make ufe of the anfwer againft him: and all this delivered under the fanction of an oath.

Lord ELLENBOROUGH C. J. This cafe falls within the common rule. The anfwer of the defendant in Chancery, admitting the execution of his bond, to which there was a fubfcribing witnefs, cannot be more than fecondary evidence: and I did not reject it as not being admiffible in any event, but becaufe the plaintiff had not laid a foundation for letting it in by fhewing that he had made inquiry after the fubfcribing witnefs *Richard Wilfon*, and had not been able with due diligence to procure any account of him. No one perfon of that name (of whom feveral were fuggefted in court within reach of inquiry) had been applied to for the purpofe of knowing whether he were the fubfcribing witnefs.

LE BLANC J. The argument of the plaintiff's counfel goes upon the fuppofition that the obligor himfelf muft know every circumftance attending the execution of the bond: but that does not follow. A fact may be known

to

to the ſubſcribing witneſs not within the knowledge or recollection of the obligor, and he is entitled to avail himſelf of all the knowledge of the ſubſcribing witneſs relative to the tranſaction.

1803.

CALL, Bart. *againſt* DUNNING.

Per Curiam, Rule refuſed.

BARCLAY, qui tam, *againſt* WALMSLEY.

Tueſday, June 14th.

The acceptor of a bill, dated 4th of *July*, and due 7th of *September*, taking a premium of 6*d*. in the pound from the indorſee and holder for payment of the bill on the 20th of *Auguſt* before it was due, is not guilty of uſury; there being no loan or forbearance.

THIS was an action for uſury upon a bill of exchange, dated 4th *July* 1801, for 30*l*., drawn by *T.* and *G. Hawkes* on the defendant, and accepted by him, payable to their own order thirty days after date, by them indorſed to one *J. Benſon*, and by him again to one *M. Cutler*. The facts were, that the bill ſo drawn and coming by indorſement to *Cutler*, which became due on the 7th of *September*, was by him preſented for acceptance to the defendant on the 20th of *Auguſt* preceding, when it was agreed between them that the defendant ſhould pay the bill then, upon an allowance of 6*d*. in the pound, which he ſaid was his uſual charge upon ſuch occaſions: and accordingly the defendant paid 29*l*. 5*s*. to *Cutler*, who thereupon gave him up the bill.

The corrupt agreement was laid in the firſt count to be made with *Cutler* on the 20th of *Auguſt* 1801, that the defendant ſhould *lend* to *Cutler* 29*l*. 5*s*., part of the 30*l*. mentioned in the ſaid bill, and ſhould *forbear* till the bill became due, viz. until the 7th of *September*, and for ſuch forbearance ſhould retain, receive, take, and reſerve to his own uſe the reſidue, viz. 15*s*. as a premium; and that for ſecuring to the defendant, and enabling him to receive and take to his own uſe as well 29*l*. 5*s*. ſo to be lent as

1803.

BARCLAY, qui tam, against WALMSLEY.

the said 15 *s.* for the forbearance, &c. making together 30 *l.*, *Cutler* should deliver up to the defendant the said bill, which he as acceptor was liable to pay to *Cutler* as indorsee and holder, when the same should become due, and thereby enable the defendant to retain to his own use the said 30 *l.*, the amount of the bill, instead of paying it over to *Cutler* when it became due: averring such corrupt contract to have been carried into effect, and the usury to have been complete on the 7th of *September*. In the second count the usury was alleged to be upon an agreement made the 20th of *August* by the defendant to *discount* the said bill for 30 *l.* by *lending* and advancing 29 *l.* 5 *s.*, part of the said 30 *l.* mentioned in the bill, and *forbearing*, &c. until the said bill became due, namely, till the 7th of *September*, and that for such forbearance the defendant should have and retain to his own use 15 *s.* premium, the residue of the said 30 *l.*, &c., laying the usury to have been complete on the 20th of *August*. There were other counts to the same effect.

It was objected at the tri[illegible] *Ellenborough* C. J. at the sittings after last term at *Westminster*, that this was no *loan* or *forbearance*, as between these parties, which it was laid to be in every count of the declaration, and which was necessary to constitute usury. That there could be no borrowing unless there were an obligation to repay, which was not the case here; but that the transaction was nothing more than an anticipation of payment, for which accommodation it might be even admitted that the defendant had taken more than an adequate consideration, but that would not constitute usury. His Lordship thought the objection well founded, and nonsuited the plaintiff.

Garrow

1803.

BARCLAY, qui tam, *againſt* WALMSLEY.

Garrow moved to ſet aſide the nonſuit, and, after ſtating the before-mentioned circumſtances, ſaid, that if this were not to be conſidered as uſury, on the ground that it was only an anticipation of payment, for which a party was at liberty to take what rate of intereſt he pleaſed, it would be very eaſy to evade the ſtatute of uſury by framing the ſecurities in this form. But

Lord ELLENBOROUGH C. J. ſaid, that to conſtitute uſury there muſt either be a direct loan and a taking of more than legal intereſt for the forbearance of repayment, or there muſt be ſome device contrived for the purpoſe of concealing or evading the appearance of a loan and forbearance, when in truth it was ſuch. But here was no loan or forbearance, only a mere anticipation of the payment of a debt by the party before the time when by law he could be called upon for it. That the defendant had been guilty of very improper practice, but not of uſury.

Per Curiam, Rule refuſed.

CLARKE and Others *againſt* COCK.

Friday, June 17th.

A, in conſideration of having commiſſioned *B*. to receive certain *African* bills payable to him, drew a bill upon *B*. for the amount, payable to his own order: *B*. acknowledged by letter the receipt of the liſt of the *African* bills, and that *A*. had drawn for the amount, and aſſured him that it would meet with due honour from him. This is an acceptance of the bill by *B*.: and the purport of ſuch letter having been communicated by *A*. to third perſons, who, on the credit of it, advanced money on the bill to *A*., who indorſed it to them, held that *B*. was liable as acceptor in an action by ſuch indorſees, although after the indorſement, in conſequence of the *African* bills having been attached in *B*.'s hands, who was ignorant of his letter having been ſhewn, *A*. wrote to *B*. adviſing him not to accept the bill when tendered to him, which, as between *A*. and *B*., would have been a diſcharge of *B*'s acceptance if the bill had ſtill remained in *A*.'s hands.

THE declaration ſtated, that one *Richard Woodward*, on the 12th of *November* 1800, drew two bills of exchange on the defendant, payable to his own order, the one for 1046 *l*. 7 *s*. 1 *d*., at 70 days after date; the order for 80 *l*. at ſix weeks after date: that the defendant accepted

1803.

CLARKE *against* COCK.

accepted thefe bills; and afterwards, and before they became due, they were indorfed by *R. Woodward* to the plaintiffs. There were alfo counts for money had and received, and upon an account ftated. Plea non affumpfit. At the trial of this caufe before Lord *Ellenborough* C. J. at *Guildhall*, a verdict was found for the plaintiffs for 1226*l.* 1*s.* 11*d.*, fubject to the opinion of the Court on the following cafe:

The plaintiffs are bankers in *Liverpool*. The defendant is one of the members compofing the *African* committee, and refides in *London*. *R. Woodward* having feveral bills of exchange in the hands of the *African* committee to the amount of 1126*l.* 7*s.* 1*d.* previous to the 12th of *November* 1800, had given an order to the defendant to receive them from the committee on his account, and the defendant had agreed to accept bills to the fame amount, to be drawn by *Woodward*. On the 12th of *November* *Woodward*, being then at *Liverpool*, drew the bills of exchange mentioned in the declaration, of which he advifed the defendant by the following letter of the fame date.

" Dear Sir, 12th *Nov.* 1800.

" I called upon you the day I left town with an order " on the *African* committee for the bills of exchange in " their hands belonging to me, but not having the plea- " fure of finding you at home, and having left the lift of " the bills, and my time being fhort, I fent it, with the lift " inclofed, by the poft from *King ftreet*, *Covent Garden*, " which you received fafe. I have now to inform you, " that I have this day valued on you for the amount to " my order, viz. at 70 days *per* 1046*l.* 7*s.* 1*d.*, and at " 6 weeks *per* 80*l.*, which I hope will be agreeable to " you as to the dates; and as they will fall due fome few " days after thofe you will get from the committee, you

" will,

" will, I truſt, have time to be in caſh without any ad- 1803.
" vance." (Signed) " *Rd. Woodward.*" On the 15th
of *November* the defendant returned the following anſwer CLARKE *againſt* COCK.
" to *R. Woodward*: " *London, Nov.* 15th, 1800. Dear
" Sir, I was very ſorry I happened to be from home
" when you did me the favour of calling with the liſt of
" bills in the hands of the *African* committee. By that
" liſt I find that they amount to the ſum you have drawn
" for as ſtated in your favour of the 12th inſtant, which
" you may be aſſured will meet due honour from, dear
" Sir, yours, &c. *S. Cock.*" *Woodward* had kept his bank account with the plaintiffs, upon the balance of which he was, at this period, indebted to them in 1626*l.* and they had therefore refuſed to advance him any more money on his general account, and had returned ſeveral of his checks for ſums of 15*l.* and 20*l.* On the 17th of *November*, after the receipt of the above anſwer, *Woodward* indorſed the bills of exchange in the declaration mentioned, and delivered them ſo indorſed to the plaintiffs, who ſhortly afterwards advanced him money upon the credit of the bills to the full amount thereof. *Woodward*, at the ſame time, either communicated to the plaintiffs *the purport* of the defendant's letter to him of the 15th *November*, or informed them that the defendant had poſitively undertaken to accept the bills, but did not then ſhew the letter to the plaintiffs, nor was it in their poſſeſſion, or ever ſeen by them before the 5th of *December* following. On the 20th of *November* 1800 the defendant wrote to *Woodward* the following letter: " *London, Nov.*
" 20th, 1800. Dear Sir, You will be greatly ſurpriſed
" to learn, that on my applying at the *African* Office for
" the bills remitted from *Cape Coaſt* on account of the
" *Pilgrim*, I found that an attachment had been laid on
" them

1803.

CLARKE *against* COCK.

"them at the suit of Messrs. *Parrys*. Under these cir-"cumstances I beg to be favoured with your direc-"tions how I am to act; and, in the mean time, I will "tell the persons who may come about your drafts, that "before I can accept them I must hear from you. Wait-"ing your reply, I am, dear Sir, yours, &c. *S. Cock*." To this letter *Woodward*, on the 22d of *November*, returned an answer to Mr. *Cock*, of which the following is an extract: "If they, Messrs. *Parrys*, persist in attaching "the bills, matters must rest as they are at present, and "you, of course, refuse to accept the bills I have drawn "on you." Neither of these letters were communicated to the plaintiffs. The defendant did, in fact, before the bills in the declaration mentioned became due, receive from the *African* committee the abovementioned bills of exchange, amounting to 1126*l*. 7*s*. 1*d*. on account of *Woodward*, which were duly paid to the defendant. On the 20th of *November* 1800, an attachment was issued out of the Lord Mayor's Court of *London*, at the suit of *William* and *Thomas Parry*, against the property of *R. Woodward* in the hands of the defendant, and which was served upon the defendant on that day; and on the 26th of the same month the defendant had notice to appear as garnishee. On the 24th of *January* following Mr. *Cock* pleaded to the attachment; and on the 28th of the same month the cause was tried, and a verdict found for Messrs. *Parrys*, with 1118*l*. 12*s*. 7*d*. damages, being the balance in his hands due to the said *R. Woodward*, and which was afterwards paid over to Messrs. *Parrys*, in consequence of the judgment obtained in such attachment. The bills were duly presented for payment to the defendant. On the 28th of *January* 1801 the plaintiffs wrote to the defend-

ant

ant the following letter: "*Liverpool*, 28th *January* 1801. 1803.
Sir, This morning Mr. *R. Woodward*'s draft on you
"for 1046*l.* 7*s.* 1*d.*, due 24th inftant, was returned to
us protefted for non-payment. As we gave Mr. *Wood-*
"*ward* the full value of this bill, and the former one,
"due the 27th of *December*, for 80*l.*, on his pofitive af-
"furance that they would be duly accepted; and as he
produced to us, in confirmation of fuch affurance, your
"letter to him of the 15th *November*, in which you fay,
"that he may be affured the fum he has drawn for, as
"ftated in his letter of the 12th inftant, will meet with
"due honour; we are under the neceffity of informing
"you that we cannot avoid confidering you as liable
"to us for the payment of thefe bills. In the pre-
"fent fituation of Mr. *Woodward*, againft whom a com-
"miffion of bankrupt has been opened, we think it not
"lefs neceffary, on your account than on our own, that
"you fhould be apprized of thefe circumftances; and
"we hope, and fhall be happy to hear, that you have
"been enabled to fecure yourfelf from lofs, which we
"are forry to fay will not be the cafe with ourfelves,
"even when the bills above mentioned are paid. We
"are, &c. *Clarkes* and *Rofcoe*." On the 30th of *January*
the defendant returned the following anfwer: "*London*,
"30th *January* 1801. Meffrs. *Clarkes* and *Rofcoe*. Gen-
"tlemen, I have received your favour of the 28th in-
"ftant, and am furprized to find that you confider me
"to be liable to you for the payment of Mr. *Woodward*'s
"two bills for 1046*l.* 7*s.* 1*d.* and 80*l.*, which bills *I re-*
"*fufed to accept*, on account of the money with which
"they were to be paid having been attached in my
"hands. Until the receipt of your letter, I never knew
"in whofe poffeffion the bills were, or I fhould have writ-

CLARKE *against* COCK.

"ten

1803.

CLARKE *against* COCK.

" ten to inform you of the circumſtance of the money " being attached : of this I did inform Mr. *Woodward* by " letter, dated the 20th of *November*, from whom I re- " ceived this anſwer, " That if Meſſrs. *Parrys* perſiſt in " attaching the bills, matters muſt reſt where they are at " preſent, and you of courſe refuſe to accept the bills I " have drawn on you." From this time I concluded " that I was not authoriſed to reſiſt the attachment. " Had I ever doubted the propriety of this concluſion, I " ſhould have been confirmed in it by your not inſiſting " on my accepting the bills, which I preſumed ſhould " have been done by you; but ſtill more ſo by your not " taking any notice of my refuſal to pay the bill for 80 *l.* " due on the 27th of *December*. Had this been done, " however queſtionable might have been the right my " letter to Mr. *Woodward* gave you to look to me for " payment, I certainly ſhould have reſiſted the attachment " inſtead of allowing judgment to take place. As it is, " I cannot but conſider that the effect of the attachment " is wholly imputable to your not having in due time " communicated to me the ſtatement contained in your " letter, and that therefore I am not liable to the payment " of the bills. Whether the attachment can be ſet aſide " or not is what I am totally ignorant of, but unfortu- " nately circumſtanced as you are I ſhall certainly retain " the money in my poſſeſſion until it is determined to " whom I am legally bound to pay it. I am, gentlemen, " your reſpectful, &c. *S. Cock.*" " P. S. I juſt beg " to obſerve, that though my letter to Mr. *W.* implied an " intention of accepting bills to the amount mentioned " in his letter to me, yet as no ſum was mentioned, it " never occurred to my imagination that any perſon " would make advances to the amount of 1200 *l.* on the " ſtrength

1803.

CLARKE *against* LUCK.

" ſtrength of my letter without previouſly applying to me, " or preſenting the bills for acceptance. *S. C.*" On the 2d of *February* the plaintiffs made the following reply. " *Liverpool*, 2d of *February* 1801. Mr. *Simon Cock*. Sir, " Although we ſhould be extremely ſorry that you ſhould " be an eventual loſer by your tranſactions with Mr. " *Woodward*, yet we cannot admit that any omiſſion has " taken place on our part that can have led to your pre- " ſent difficulty. From the tenor of your letter of the " 15th *November* to Mr. *Woodward*, we could entertain " no doubt that the bills quoted in his letter to you of the " 12th would be duly accepted, nor did we know upon " what grounds ſuch engagement was entered into. The " bills ſo received were remitted by us in courſe to Sir " *James Eſdail* and Co., and *duly preſented for acceptance*. " And when the firſt for 80*l.* was returned we gave no- " tice to Mr. *Woodward*, who was then, as far as we " know, ſolvent, expecting he would remove the difficulty " which prevented the acceptance and payment of the " bills. We cannot help particularly adverting to the " extract with which you have favoured us from Mr. " *Woodward*'s letter in anſwer to yours of 20th *Novem-* " *ber*, in which he ſays you will of courſe refuſe to accept " the bills I have drawn upon you. This would have " been very right if Mr. *Woodward* had then been the " holder of ſuch bills; but after having negotiated them, " and received actual value for the amount, and depoſited " with us yours of the 15th of *November* as evidence of " your acceptance, it was no longer competent for him to " diſcharge that promiſe, any more than it was neceſſary " for us to remind you that ſuch engagement on your " part had taken place. We are happy to find on your " own account that you are the holder of ſome bills as

1803.

CLARKE *against* COCK.

" an indemnity to you for this acceptance; and if your " right to detain them depend on the queſtion whether " you had rendered yourſelf liable on behalf of Mr. " *Woodward*, we may congratulate both you and our- " ſelves that this circumſtance had certainly taken place. " You ſpeak of having allowed judgment to paſs, which " we cannot but think was inadvertently done, when you " muſt have recollected the contents of your letter, and " known that Mr. *Woodward* had drawn and negotiated " the bills in conſequence. But we hope on your behalf " that you may yet be able to obviate the effects of ſuch " judgment, ſo as to retain from the funds you hold what " you may pay on Mr. *Woodward*'s behalf. We have " only to add, that if on further conſideration you are " not ſatisfied with the juſtice of our claim, we ſhall nei- " ther preſs you unreaſonably in point of time as to your " deciſion, nor unadviſedly adopt any unjuſt meaſures. " When we are further appriſed of your intentions we " will lay the caſe before counſel, and ſhall be guided by " their opinion; after which, if any difficulties ſhall re- " main, we ſhall be glad to join with you in terminating " them with as little expence and trouble as poſſible; " being with much reſpect yours, &c. *Clarkes* and *Roſ-* " *coe*." The queſtion for the opinion of the Court was, Whether the plaintiffs were entitled to recover? If the Court ſhould be of opinion they were entitled to recover, then the verdict to ſtand; if not, then judgment of non-ſuit to be entered.

Scarlett for the plaintiff made two queſtions, 1ſt, Whether there were a due acceptance of the bills by the defendant? 2d, Whether ſuch acceptance were done away by ſubſequent circumſtances? 1. An acceptance of a

1803. CLARKE *against* COCK.

bill of exchange need not be in writing upon the bill; for though the ſtat. 3 & 4 *Ann. c.* 9. for regulating inland bills of exchange ſays, (ſ. 5.) that no acceptance of any ſuch bill ſhall be ſufficient to charge any perſon, "unleſs the ſame be underwritten or indorſed *in writing thereupon;*" yet that is only neceſſary with reſpect to *coſts*, and ſuch bills may ſtill be accepted by *parol*, according to *Lumley* v. *Palmer* (*a*), and *Pierſon* v. *Dunlop* (*b*). There is no technical form of acceptance: it is no more in effect than a promiſe to pay the bill when due, which is expreſsly conveyed by the defendant's letter of the 15th of *November* 1800. It is not material that the letter itſelf was not ſhewn before the bills were negotiated to the plaintiffs; but the purport of it was communicated to them, that the bills would be honoured by the defendant when due. *Powell* v. *Monnier* (*c*) comes neareſt to the preſent caſe, where a ſimilar letter to the drawer, in anſwer to one adviſing him of the drawing of the bill, was holden to be an acceptance. So an agreement to accept amounts to an acceptance. *Maſon* v. *Hunt* (*d*). Then, 2dly, if the bills were duly accepted, nothing which paſſed between the drawer and acceptor after the bills were negotiated into third hands, nothing leſs than the expreſs declaration of the holders, could do away or qualify ſuch acceptance as againſt the holders. *Dingwall* v. *Dunſter* (*e*). In *Johnſon* v. *Collings* (*f*) the promiſe to accept was made *before* the bill was drawn; which ſufficiently diſtinguiſhes that caſe from the preſent. [*Le Blanc* J. And there too the promiſe was not communicated to the holder at the time.]

(*a*) *Rep. temp. Hardw.* 74.
(*b*) *Cowp.* 573.
(*c*) 1 *Atk.* 611.
(*d*) *Dougl.* 297.
(*e*) *Dougl* 247.
(*f*) 1 *Eaſt's Rep.* 98.

1803.

CLARKE *against* COCK.

Gibbs contrà. 1st, This was not an acceptance, but only a promise to accept in future upon a tender of the bill. In *Johnson* v. *Collings* (*a*) it was thought that the cases had gone too far in admitting of an acceptance by parol, however positive, or any other than an express acceptance in writing on the bill itself: therefore the Court will not carry the laxity further than the cases have already proceeded. And the decision in that case, that a promise to pay a bill not then drawn was no acceptance, went to narrow the principle deducible from the former cases. Now here, though the bills were actually drawn before the defendant's letter was written, yet as they then still remained in the drawer's hands, they were inoperative as bills; and when afterwards issued, they never were in fact presented for acceptance, which the usual form of pleading shews to be necessary. For a declaration against an acceptor always states that the bill was presented to him for acceptance, and that he thereupon did accept it; whereas here it is only stated that the bills were drawn on the defendant, and that he accepted them, without stating that they were presented for acceptance. If then this were only a promise to accept, such a promise, however binding for a good consideration, can only be enforced by the person to whom it was made, and cannot be assigned to another as an acceptance itself by the law-merchant. A mere promise to do an act cannot be the subject matter of an assignment like an act done (*b*). Nor can the communication of such promise to the plaintiffs vary the case; for if such a promise amount in itself to a positive acceptance, it would necessarily pass by the indorsement of the bill whether communicated or not at the time to the holder.

(*a*) 1 *East's Rep.* 98 (*b*) *Ibid.* 103.

But

1803.

CLARKE *against* COCK.

But if it were neceffary that fuch communication fhould be made, which may be collected from what was faid in *Johnfon* v. *Collings*, it fhould at leaft have appeared that the letter itfelf was fhewn to the plaintiffs when the bills were negotiated to them, and not merely the *purport* of it ftated. For if the notice be the operative thing, it cannot go further than the fact itfelf notified, which was only that the defendant had promifed to honour the bills when due, and not that he had accepted them. [Lord *Ellenborough* C. J. If the law in this refpect were to be framed de novo, it might perhaps be defirable to have nothing elfe taken as an acceptance than an acceptance in writing on the bill itfelf, that every one to whom it paffed might fee on the face of the inftrument itfelf whether or not it were accepted: but it is now much too late to recur back to that, after the various decifions in the times of Lord *Hardwicke* and Lord *Mansfield*.] At any rate, the doctrine of fuch implied acceptances, being itfelf of equitable origin, ought to have equitable exceptions when they exift as they do here. 2dly, The defendant was at all events difcharged by the laches of the plaintiffs in not communicating to him that they had been induced to take the bills upon the reprefentation made to them of his promife to accept; (fuch acceptance not appearing upon the bills themfelves). If they had done fo, it would have enabled the defendant to have explained to them how the tranfaction ftood. Or had he even known the fact of fuch reprefentation having been made (the contrary of which he had reafon to collect from *Woodward*'s fubfequent letter to him, advifing him to refufe to *accept* the bills when prefented), the defendant might have refifted the foreign attachment fued out by the *Parrys*. [*Lawrence* J. The

1803.

CLARKE against CACK.

defendant must at least have known from *Woodward's* letter that the bills were negotiated out of his hands.]

Scarlett in reply. The circumstance of the plaintiffs' not presenting the bills for acceptance rather shews that they considered them to have been already accepted. *Pillans* v. *Van Mierop* (a) is decisive that an engagement to accept is an acceptance in law; and *Wilkinson* v. *Lutwidge* (b) there cited by *Yates* J. shews that such acceptance may be by collateral writing. And this is recognized by the very exception made by the statute of *Anne* as to costs. Then if it were such an acceptance as was binding between the parties at the time when it was given, it was necessarily transferred with the bills. If indeed *Woodward* had passed the bills after sending the letter to the defendant discharging his acceptances, that would have been a fraud upon him, and would not have bound him as acceptor: because while *Woodward* was the holder he might legally give such discharge; but after he had negotiated the bills, any discharge by him was inoperative. No laches can be imputed to the plaintiffs for want of giving notice to the defendant; for *Woodward's* letter to him, containing the supposed discharge, gave him information at the same time that the bills were negotiated; and he was consequently bound to know that *Woodward* could not discharge him. The fraud, if any, was between *Woodward* and the defendant.

Lord ELLENBOROUGH C. J. The defendant is sued as acceptor of certain bills of exchange drawn on him by *Woodward*, payable to his own order, and indorsed by

(a) 3 *Burr.* 1663—1669. (b) 1 *Stra.* 648.

him

him to the plaintiffs; *Woodward* having before deposited certain other bills in the hands of the defendant, and empowered him to receive the money due on them. On the 12th of *November* 1800 *Woodward* wrote a letter to the defendant, in which he informed him that he had that day "*valued* on him" to the amount of 1046*l.* 7*s.* 1*d.* and 80*l.*, meaning that he had drawn bills of exchange upon him for such value, which gave the defendant notice of the bills being drawn. The question is, Whether the answer returned by the defendant amount to an acceptance, and that answer communicated to the plaintiffs, who took the bills on the faith of the representation made by *Woodward* to them of the contents of the defendant's letter? In that letter, dated the 15th of *November*, the defendant informed *Woodward* that he had received the list of bills in the hands of the *African* committee, by which he found that they amounted to the sum for which *Woodward* had drawn, as stated in his favour of the 12th, "*which he might be assured would meet with due honour from him*" (the *defendant*). The first question is, Whether, as between the defendant and *Woodward*, without further circumstances, and things standing as they then did, this did not amount to an acceptance? And it has been laid down in so many cases that a promise *that a bill when due shall meet due honour* amounts to an acceptance, and that without sending it for a formal acceptance in writing, that it would be wasting words to refer to the books on this subject. It is as clear, that if the bills had remained in *Woodward*'s hands at the time of his writing the letter of the 22d of *November*, wherein he informed the defendant, that if the *Parrys* persisted in attaching the *African* bills in his hands, matters must rest as they then were, and the defendant would of course refuse to accept

1803.

CLARKE *against* CUCK.

the

1803. CLARKE against COCK.

the bills drawn on him by *Woodward*, this would have been a difcharge of the defendant's acceptances. But in the mean time *Woodward* had paffed the bills in queftion to the plaintiffs, and at the fame time, as the cafe ftates, had either communicated to them the *purport* of the defendant's letter of the 15th of *November*, or informed them that the defendant had pofitively undertaken to accept the bills; they having before refufed to advance him any more money on his own credit. Then does not a promife to accept an *exifting* bill (for I do not wifh to confider the cafe fo largely as the doctrine is laid down in *Pillans* v. *Van Mierop*, though that opinion is fupported by great authority,) amount to an acceptance, and bring the cafe directly within the doctrine as recognized in *Johnfon* v. *Collings?* Lord *Mansfield* indeed, in *Pierfon* v. *Dunlop*, *Cowp.* 573. is reported to have faid, "that the mere anfwer of a merchant to the drawer of a bill, that *he will duly honour it*, is no acceptance, unlefs accompanied with circumftances which may induce a third perfon to take the bill by indorfement:" but that clafhes with what he had faid in *Pillans* v. *Van Mierop*, and is contrary to what was there faid by Mr. Juftice *Yates*. Then here was an undertaking by the defendant in writing, by a collateral paper, to accept the bills, which induced a credit, without which the plaintiffs would not have given value for them. The defendant has thereby enabled another with truth to affert, and furnifhed him with the means of proving that affertion by the production of the defendant's letter, that he had undertaken to accept the bills, which, in ordinary mercantile underftanding, amounts to an acceptance, and by that credit was attached to the bills. Then the hardfhip of which the defendant now complains, having had the other bills of *Woodward* attached in his hands, has grown

grown out of his not fully underſtanding the legal effect of what he had done, and is not imputable to the plaintiffs. It may be for the convenience of mercantile affairs that a bill may be accepted by a collateral writing, without the bill itſelf coming to the actual touch of the acceptor, which would ſometimes create great delay. This acceptance, being by writing, comes within all the caſes cited. It would be good, according to ſome, even by parol; but that an acceptance by a collateral writing is good is clear from *Pillans* v. *Van Mierop* and other caſes. And though the common form of declaring may be, that the bill was preſented for acceptance, yet it has never been conſidered to be neceſſary to give ſtrict proof of ſuch an allegation, if an agreement to accept were proved.

1803.

CLARKE *againſt* COCK.

GROSE J. This may be a hard caſe on the defendant, but it would be equally ſo at leaſt on the plaintiffs, who have advanced their money on the credit of the repreſentation made to them, and truly made, as it appears, that the defendant had engaged to honour the bills when due. The material queſtion is, Whether the defendant's letter of the 15th of *November* amount to an acceptance? In *Pillan* v. *Van Mierop*, it is treated as a common tranſaction that a *verbal* promiſe to accept will bind. Now this is more, for it is a *written* promiſe to accept: and it is diſtinguiſhable from *Johnſon* v. *Collings*, which occurred to me on firſt reading the caſe for that was a promiſe to accept a bill not then drawn. And upon looking farther into the caſes I found Lord *Mansfield* making the diſtinction which has been alluded to in *Cowp.* 573. where he ſays, that the mere anſwer of a merchant to the drawer of a bill that he will duly honour it is no acceptance, *unleſs accompanied with circumſtances*

 which

1803.

CLARKE *against* COCK.

which may induce a third person to take it by indorsement." On this an observation has been made by my lord; but here third persons have been so induced to take the bills by the act of the defendant. It is objected, however, that the plaintiffs have been guilty of laches in not informing the defendant of their having received the bills with notice of his acceptance; but it rather appears to me that the negligence, if any, is imputable to the defendant, for not having defended himself against the attachment in the Mayor's court, upon the ground of his acceptance of these bills upon the pledge of those deposited in his hands by *Woodward.* Upon the whole, it appears that the defendant's letter of the 15th of *November* was an acceptance; that the plaintiffs have been in no fault; and that the transaction between them and *Woodward* was bonâ fide; which brings the case within the common rule of mercantile transactions, and entitles the plaintiffs to recover.

LAWRENCE J. It would have been much better doctrine if it had been originally determined that nothing else should amount to an acceptance than a written acceptance on the bill itself. But it is now too late to revert to that, it having been determined by many cases that an acceptance may be by parol. What is an acceptance but an engagement to pay the bill when due? This, then, is stronger than a parol acceptance, because it is a written engagement. The only question, then, is, Whether a letter written by the drawee to the drawer, in which he assures him that the bills will meet with due honour from him, the drawee, is not an engagement to pay the bills when due? of which there can be no doubt. If the defendant had only intended to make a conditional

acceptance,

1803. CLARKE *against* COCK.

acceptance, in case the bills lodged in his hands were productive to him, he should have so expressed himself; and then, unless the bills were productive, he would not have been liable, and no person would have given the same general credit to them upon the faith of his letter. In one early case, *Powell* v. *Mounier* (*a*), Lord *Hardwicke* says, that a promise by parol to honour a bill is an acceptance. That was where the drawer of a bill of exchange, having acquainted *Mounier* by letter of his having drawn a bill on him for 50*l.* desiring him to accept it, *Mounier* wrote in answer that the 50*l.* bill should be duly honoured and placed to his debit. Lord *Hardwicke* there said, "What determines me is the letter, by which it appears very clearly that he accepted the bill; for he mentions it and says, it *shall be duly honoured* and placed to the drawer's debit." That was, therefore, determined to be an acceptance; and the commercial world have acted ever since upon the ground of that determination; and numberless bills have been paid in consequence after such acceptances. We should be doing great mischief if we were to overturn this doctrine. The situation of the defendant has been induced by his own act. He might have resisted the attachment upon the ground of his acceptances, which would have been a defence to him.

LE BLANC J. Whatever weight there might be in the defendant's argument, if the question were now to be agitated for the first time; yet it is material to the mercantile world that this point should not be shaken, if it have been acted upon for a long period. Now from Lord *Hardwicke*'s time to the present it has been understood

(*a*) 1 *Atk.* 613.

that

1803.

CLARKE *against* COCK.

that a parol engagement to accept is an acceptance. The laſt caſe upon this ſubject is *Johnſon* v. *Collings*, which was not a promiſe to accept a bill then drawn, or a bill of any particular deſcription, but a promiſe to pay a bill that would be drawn; and ſuch a promiſe was holden not to be an acceptance. Now here, ſuppoſe, inſtead of a verbal communication to the plaintiffs, the holders, of the contents of the defendant's letter, the letter itſelf had been annexed to the bill, would not that have been an acceptance as much as if it had been written on the face of the bill? But it is ſaid that this caſe is diſtinguiſhed from what it would have been had the letter itſelf been communicated to the plaintiffs, from the variance, as it is contended, between the letter and the purport of it, as mentioned to them, which it is ſaid amounted only to a promiſe to accept. But ſuppoſing that to have been ſo, have not the caſes decided that ſuch a promiſe, (and I confine myſelf at preſent to the circumſtances of this caſe,) made after the bills were drawn, and communicated to third perſons, who, on the credit of it, advance their money on the bills, ſhall operate as an acceptance. Then all that can be imputed to the plaintiffs is, that they, knowing the law, that this was an acceptance, did not ſend to the defendant to get another acceptance. The defendant, perhaps, and *Woodward*, have acted under an ignorance of the law; but the plaintiffs, who have acted according to law, are not to ſuffer on that account. And before the defendant parted with the money out of his hands, the produce of *Woodward*'s bills, he ſhould have informed himſelf correctly where the bills drawn upon him were, and what had been done under his letter notifying his acceptance. If one or other party muſt ſuffer,

it is more proper that the loſs ſhould fall upon the one who has acted under an ignorance of the law, than upon the others who have acted in conformity with it, and on the credit of the defendant's acceptance.

Poſtea to the plaintiffs.

SWANCOTT *againſt* WESTGARTH.

Saturday, Nov. 18th.

The plaintiff is entitled to recover for goods ſold and delivered upon credit for a certain time, it appearing by the ſpecial memorandum that the bill was filed on a day ſubſequent to the expiration of the credit, though the writ appeared to have iſſued before. But if the defendant were actually arreſted before the credit expired, ſemble that he has his remedy in damages.

THIS was an action for goods ſold and delivered on credit, and the queſtion was, Whether the action were commenced before the time of the credit had expired? The goods in queſtion were linens, and the uſual credit in that trade was three clear months, not including the months of buying and ſelling, and certain days over. In this inſtance the credit expired on the 26th of laſt *November*. And by reference to the ſpecial memorandum, which was of a bill filed the laſt day of term (the 29th,) the action was commenced in time; and by this it was inſiſted at the trial, at *Guildhall*, after the laſt term, on the part of the plaintiff, that the commencement of the action was to be bound; but Lord *Ellenborough* permitted the defendant to ſhew the true commencement of the action by the writ, which, being produced, was proved to have iſſued on the 23d of *November*, and ſhewed of courſe that the action was commenced too ſoon by three days; on which there was a verdict for the defendant. A rule was obtained on a former day in this term for ſetting aſide the verdict and granting a new trial, on an affidavit, ſtating, that the defendant was not arreſted on the writ ſued out on the 23d, but on an alias iſſued on the 26th, and executed on the 27th: and alſo on the authority

1803.

SWANCOTT *against* WESTGARTH.

authority of the cases of *Foster* v. *Bonner* (*a*), and *Best* v. *Wilding* (*b*), where the distinction was taken that with respect to the cause of action the bill is taken to be the commencement of the suit, though the day of issuing the writ may be replied to the statute of limitations to save the time, and may be shewn for other purposes.

And of this opinion were *the Court* on shewing cause. And Lord *Ellenborough* C. J. said, that, however hard it might be on a defendant who was arrested before the time for which the credit was given, yet that the issuing of the writ was merely process to bring the party into court, and the Court must look to the filing of the bill as the commencement of the suit: but he added, that he did not know that a defendant under such circumstances might not have his remedy for the actual arrest before the time when the debt was due.

Per Curiam, Rule absolute.

(*a*) *Cowp.* 454. (*b*) 7 *Term Rep.*

Saturday, *June* 18th.

COOPER *against* MARTIN.

One who marries a widow, having children by her former husband, is not bound to maintain such children, though they were maintained by the widow before her second marriage, when her second husband acquired her former means. Therefore, if the second husband maintain such children, it is a good consideration for a promise by them when they come of age to repay the expence of their maintenance respectively: especially where the second husband was a man of small substance, and the children had a competent provision to receive when they came of age, which was to accumulate for them in the mean time, and he made no application to Chancery for an allowance out of the fund, as he might have done.

ASSUMPSIT for meat, drink, washing, lodging, and other necessaries provided by the plaintiff for the defendant for seven years before, for which the defendant afterwards promised to pay him so much. There was a second count upon a quantum valebant, and other com-

mon counts: To which the defendant pleaded the general issue, and gave notice of set off for wages, work and labour, &c. At the trial before *Grose* J. at the last assizes for the county of *Suffolk* the case appeared to be as follows: The defendant was the son of the plaintiff's wife by a former husband, and he and three other children of the former marriage were maintained by the plaintiff for several years during their minority; and after the defendant came of age, and a demand was made upon him by the plaintiff for the expences of his maintenance, the defendant promised to pay it. The situation of the family was this; the defendant's father died insolvent, and the plaintiff did not appear to have any substance of his own, having been obliged to sell a small estate, which he had at the time of his marriage, to satisfy certain creditors to whom his wife had bound herself for her former husband's debts. But she had a freehold estate of about 100 *l.* per annum clear value, with a house upon it, in which she and her children were living when she married the plaintiff, and in which they all continued to reside for some years, till the defendant left them, when about the age of nineteen. This estate of hers, and the fortune of the defendant and the rest of her children, came to them by the will of her uncle, whereby he devised all his messuages, lands, &c. at *Wickam* to certain trustees, in trust to pay the clear rent and profits to his niece *Ann*, the wife of *John Martin* (*a*), during her life, for her own separate use; remainder to certain of her children. He then devised about 20 *l.* a-year in land to each of her children (including the defendant), with a proviso in case of the death of any of the children before the age of twenty-one years respectively, without leaving issue of their body, that the estate so given to the child so dying was

1803

COOPER *against* MARTIN.

(*a*) Now the plaintiff's wife.

to

1803.

Cooper *against* Martin.

to be ſold by the truſtees, and the money to be ſhared among the ſurvivors, as and when they ſhould reſpectively come of age. And to each of the children was further given a legacy of 500 *l.*, and the teſtator directed the ſame, with the accumulating intereſt, to be paid as and when they ſhould reſpectively attain the age of twenty-one years, with the ſame proviſo as before in caſe of the death of either before age.

It appeared that the plaintiff had brought up the children and given them boarding in a manner ſuitable to their expectations, but beyond what could have been expected of him, upon a ſuppoſition that no proviſion was made for them out of which he might thereafter be reimburſed when they came of age. A ſiſter of the defendant, who ſtill lived in the plaintiff's family, proved that in a converſation with the defendant, in which ſhe had mentioned her own intention of paying for her board, the defendant ſaid that he ſhould have paid the plaintiff but for his eldeſt brother, who had adviſed him not to do ſo. The plaintiff's claim was at the rate of twenty guineas a-year board, waſhing, and lodging, for five years and upwards. The learned Judge left it to the jury, Whether the plaintiff had ſupplied the defendant with more than his ſtate and condition required? that if he had not, or to the extent at leaſt that was neceſſary and proper, it was a meritorious conſideration to ſupport the promiſe made by the defendant after he came of age. The jury were of opinion that the expence incurred by the plaintiff in the maintenance of the defendant amounted to 20 *l.* a-year, but that according to the defendant's ſtate and condition there ought not to have been more than 10 *l.* a-year expended upon him; and therefore they found a verdict for the plaintiff for 50 *l.* for five years. And the

defendant

defendant had leave to move to enter a nonfuit if the Court thought that the action was not maintainable, or why a new trial fhould not be had. And a rule nifi having been obtained, 1803.

COOPER *againft* MARTIN.

Sellon Serjt. fhewed caufe againft the rule, and contended, that the action was maintainable on general principle, as well as on the fpecial circumftances of the cafe. The obligation of maintaining one another by the ftatute (*a*), founded on the law of nature, only holds between natural parents and children, and extends not to fimilar relationfhip contracted by marriage. For though the contrary was once fuppofed to have been decided in two cafes, in the time of Queen *Anne*, of *R.* v. *Clentham* (*b*), and *R.* v. *St. Botolph's, Aldgate* (*c*), yet thefe were over-ruled in the fubfequent cafe of *R.* v. *Munday* (*d*), which has been recently confirmed in *Tubb* v. *Harrifon* (*e*); and in *Woodford* v. *Lilburn* (*f*).

Lord ELLENBOROUGH C. J. The cafe of *Billingfly* v. *Crickett* (*g*) went much farther; for there the Court of Chancery held that the mother herfelf, after a fecond marriage, was not liable; and decreed maintenance out of the intereft of the children's fortunes. We will hear the other fide.

Wilfon and *Beft* contrà. Nothing was furnifhed to the defendant and the other children beyond plain neceffaries, which, if the plaintiff were bound by law to provide for them, being the children of his wife, there was

(*a*) 43 *Eliz. c.* 2. *f.* 7.
(*b*) *Foley*, 39.
(*c*) *Ib.* 42.
(*d*) 1 *Stra.* 190.
(*e*) 4 *Term Rep.* 118.
(*f*) 20 *Geo.* 2. 1 *Conft.* 325.
(*g*) 1 *Bro. Ch. Caf.* 268.

no

1803.

Cooper *against* Martin.

no consideration for the subsequent promise. It was indeed said in *Tubb* v. *Harrison*, and other cases, that the statute of *Elizabeth* extends only to *natural* relations, and that consideration alone was the ground of those determinations; but the true reason of the second husband's liability in such cases is that the natural mother being by law bound to maintain her own children, he who marries her takes her with this burthen, and is immediately chargeable with it like any other of his wife's debts. Upon this principle the cases of *R.* v. *Clentham* and *R.* v. *St. Botolph's, Aldgate*, proceeded, which appear to have come judicially before the Court; and therefore Lord C. J. *Pratt* was mistaken in his representation of them in *R.* v. *Munday*, and in stating that the point was then res integra. For it had also been decided in another case, of one *Jinkes* (*a*), referred to in *Foley*, 44. where an order upon the grandmother, who had married a second husband, to maintain her grand-children, was quashed; the Court saying, that a feme covert could not be charged; but that they ought to have charged her husband. The same question came under consideration in *Gerard's* case (*b*), which was heard at great length before the Judges, *Whitlocke* and *Croke*, at Serjeant's Inn, when they both agreed that the husband would be chargeable if he received any portion with his wife, though they differed otherwise. This case was recognized as good law by Lord *Holt* in *Walton* v. *Spark* (*c*). The case of *R.* v. *Munday* is also reported in *Fortescue*, 303., where this reason, which seems but of little weight, is assigned for the decision, that the mother, after her second marriage, cannot be of ability to maintain her children by the first

(*a*) *Styl.* 283. (*b*) 2 *Bulstr* 346. (*c*) *Comb.* 321.

marriage,

1803.
COOPER *against* MARTIN.

marriage, and the second husband cannot be liable in respect of her property, being a purchaser for a valuable consideration. But it would be more reasonable, according to the distinction noticed in 1 *Blac. Com.* 448., to hold that the husband takes the wife's estate subject to her obligations; for otherwise, though the mother were of ability and under an order to maintain her children, she, by her own act, in marrying a second husband, can release herself and her husband from such legal liability, and throw the burden of maintaining her children upon the parish. Admitting, therefore, the cases of *R.* v. *Munday* and *Tubb* v. *Harrison* to be law; yet, on the reason assigned in *Fortescue*'s report of the former, this action is not maintainable; for here the wife had a separate estate by the will of the uncle, and therefore continued of ability after her coverture as well as before. Then if she were liable in respect of such separate estate, it is unnecessary now to inquire whether an order might have been made upon her alone, or upon the husband, or upon both; or whether the husband might not have applied to the Court of Chancery for an allowance of maintenance: though it is observable that neither interest nor maintenance is given by the will to the children, but the whole of their shares is to accumulate till they respectively come of age; and in case of the death of either before, his share is to go over. At any rate, the husband not having applied for maintenance at the time, it is now too late to supply the omission in another mode. But supposing a father-in-law is in no event liable to support his wife's children, and that the plaintiff might, if he had pleased, have thrown them upon the parish; yet having chosen voluntarily to support them as a gift, and not upon a contract, he cannot now convert the charge into a debt.

1803.

Cooper *against* Martin.

a debt. In *Stone* v. *Carr* (*a*), which was an action by a schoolmaster for the board and education of one of the children of the defendant's wife by a former husband, it appeared that the defendant, after his marriage, lived for some time in the house which the first husband had occupied together with the family, and then went abroad, leaving the wife and children in the same place, after which the wife had placed the child at the plaintiff's school. And Lord *Kenyon*, though he adhered to the decision of *Tubb* v. *Harrison*, yet held that the second husband, having adopted the children and treated them as part of his own family, stood in loco parentis, and was bound to the plaintiff. And he added, that if the wife enjoyed property from her first husband, it made the case stronger; but that even if he had died insolvent it would not have altered his opinion.

Lord Ellenborough C. J. However that case might be afterwards as between the father-in-law and the child, yet, as to third persons, the former was bound by the acts of his wife in providing for the children whom he held out to the world as part of his family. So here, the plaintiff would have been liable to the tradesmen who supplied the children with necessaries by his wife's orders, while they were living with him as part of his family. But as to the general obligation of parents and children to provide for each other, in *Tubb* v. *Harrison*, which is the latest decision upon the subject, and in which the other authorities were considered, it was holden to extend only to natural relations. Then the plaintiff, not standing in that relation to his wife's children by her former husband, was not bound by the act of marriage with their mother

(*a*) 3 *Esp. Ni. Pr. Cas.* 1.

to

to maintain them, but ſtood in that reſpect in the ſituation of any other ſtranger. And having done an act beneficial for the defendant in his infancy, it is a good conſideration for the defendant's promiſe after he came of age. In ſuch a caſe the law will imply a requeſt; and the fact of the promiſe has been found by the jury. The caſes both at law and in equity have certainly gone on conſidering a child ſo circumſtanced as being entitled to maintenance out of the fund, and the plaintiff might have applied to Chancery for an allowance in this caſe: but though he did not make ſuch application, but expended his own funds for the benefit of the defendant, it is a good conſideration at leaſt for the ſubſequent promiſe to repay him.

GROSE J. In *Southerton* v. *Whitlock* (*a*), it was holden that if goods be provided for an infant, though not neceſſaries, yet if, after he come of age, he promiſe to pay for them, he is bound. Then if bound to a ſtranger in ſuch a caſe, there is no reaſon why he ſhould not be bound to a father who has provided for him as the plaintiff has done. There is good reaſon, upon general principle, why ſuch a promiſe ſhould be binding; for it operates as an encouragement to a father, who, having himſelf only a ſmall income, has a ſon with a good eſtate, which he is not to enjoy till he comes of age, to incumber perhaps his own fortune in giving his ſon an education proportionable to his future proſpects, but beyond his own means, upon the expectation that his ſon will take the circumſtance into his conſideration after he comes of age. Then it is that he is to judge whether or not he will make

(*a*) 1 *Stra.* 690. and vide S. P. 1 *Ld. Ray.* 389.

1803.

COOPER *against* MARTIN.

the promise, and to what extent. But if he do, it is for the public benefit that he should be bound by it.

LAWRENCE J. The early cases referred to proceeded upon a mistake, in considering the maintenance of the children as a *debt* of the mother, who has married a second husband, or as a *debt* on her estate. The wants of the children are only a ground for an order of maintenance on the parent, if of sufficient ability. But when she has parted with that ability by her second marriage she is no longer liable. The husband only takes her *debts;* but this is no *debt* of hers. Ceasing to be of ability, the maintenance of the children could not have been enforced by an order against her, and therefore could not have been enforced at all. Then the plaintiff, having conferred the benefit without any obligation, it is a good consideration for the promise by the defendant after he came of age.

LE BLANC J. The only method of compelling maintenance is by the order prescribed by the stat. of *Elizabeth;* and in the latter cases it has been settled that that statute only extends to natural relations. It was so ruled in *R.* v. *Munday*, and more recently confirmed in *Tubb* v. *Harrison*. Then the question is, Whether, the plaintiff having afforded maintenance to the defendant without any obligation, it is not a good consideration for a promise after the defendant came of age? What was the situation of these parties? The father, a man with a small income; the defendant, entitled to a good provision if he lived to the age of twenty-one, which was to accumulate for him in the mean time. The father might have applied to Chancery to have part of the accumulation for the

the maintenance and education of the fon, which would have been granted to him; but not having done fo, the accumulation has gone to increafe the fon's eftate, Therefore, here is a clear good ground for the promife. And the jury having only given half the maintenance, I doubt whether we fhould do a benefit to the defendant by fending this to a new trial.

1803. COOPER *againft* MARTIN.

Rule difcharged.

COARE *againft* GIBLETT.

Monday, June 20th.

A bond to fecure an annuity fet forth in the memorial recited that the confideration-money, 1,400*l*., was paid on the 24th of *Dec.*, when all the deeds except one were executed and bore date; and the memorial alfo contained a fpecific allegation that the confideration-money was paid, but without ftating any particular time; but, in fact, that one deed not having been executed by one of the grantors, the grantee delivered over the confideration-money on that day to another of the grantors to be by him lodged in a banker's hands in the names of himfelf and the grantee's attorney till that deed was executed, and fuch deed was not in fact executed, nor the money actually available to the grantors till the 26th of the fame month: held that this was a fubftantial compliance with the annuity act, 17 *Geo.* 3. *c.* 26., the time of payment of the confideration-money not being fpecifically required to be ftated by that act, nor being any otherwife material than as entering into the queftion of the value of the confideration. And held, that upon an iffue taken (in an action of debt on bond) in general terms, without reference to the annuity act, upon a traverfe that the confideration-money was not paid *by the grantee* to the ufe of the grantors; evidence that it was fo paid on the 26th by the grantee's agent will fuftain the affirmative of the iffue fo generally framed.

IN debt on bond, dated the 24th of *December* 1796, in the penal fum of 2,800*l*., the defendant craved oyer of the bond; by which it appeared to be a bond by the defendant fingly to the plaintiff; and of the condition, which, reciting that whereas *Wm. Smith*, *George Smith*, *R. Underhill*, *Charles Comber*, *Cleophas Comber*, and *Daniel Smith*, had contracted with the plaintiff to grant him an annuity of 155*l*. 11*s*. 1*d*. for the life of the furvivor of thofe fix perfons; and that by a bond of the fame date (the 24th of *December* 1796,) five of thofe fix perfons named became jointly and feverally bound, and it was intended that *Charles Comber*, the fixth, fhould alfo have become bound to the plaintiff in 2,800*l*., conditioned for the payment of the annuity during the life of the furvivor of them, the grantors, by four quarterly payments, viz. the 24th of *March*, 24th of *June*, 24th of *September*, and

1803.

COARE *against* GIBLETT.

24th of *December* in each year; and reciting farther, that *Charles Comber* had, by an unfortunate accident, been rendered incapable of executing the said bond on that day, and therefore that the defendant, at the request of the other grantors, had agreed to become a surety with them for the payment of the annuity, "in consideration of the "sum of 1,400*l.* having been *this day paid by the said Wm.* "*Ware* (the plaintiff) to or for the use of them the said "*W. S., G. S., R. U., C. C., Cl. C.*, and *Daniel Smith*;" was that the bond (in suit) should be void if the said annuity were truly paid during the life of the survivor of the six persons named. And then the defendant pleaded, 1st, non est factum, on which issue was joined. 2dly, That the plaintiff, within twenty days of the execution of the said bond, caused a memorial of that and certain other instruments for granting and securing the said annuity to be inrolled in Chancery: and then set out the memorial (in the manner stated in the former report of this case upon the demurrer (*a*), in which the several instruments were mentioned, all dated the 24th of *December* 1796, "in consideration of the sum of 1,400*l. that day* paid to "the said *W. S., G. S., R. U., Ch. C., Cl. C.*, and *Daniel* "*Smith, and which sum of* 1,400*l. was in fact paid to the* "*said* Daniel Smith, *for the use of himself and the said* "W. S., G. S., R. U., Ch. C., *and* Cl. C., *by* Wm. "Coare." The plea then stated that the bond first mentioned in the memorial was a bond dated the 24th of *December* 1796, whereby the grantors became *jointly and severally* bound, and that the memorial (in which it was at first only stated that they *became bound*, not saying *jointly and severally*, though it was afterwards so stated in the recital of another bond as set forth in the memorial (*a*),)

(*a*) Vide *ante*, 3 *East* 461.

was

was not a good and ſufficient memorial of the bond and of the conſideration of granting the annuity by reaſon of which the bond (in ſuit) was void in law. To this plea the plaintiff replied, that it was a good memorial of the bond therein mentioned, and of the conſideration of granting the ſaid annuity according to the form of the ſtatute, &c. To which there was a general demurrer and joinder. 3dly, The defendant pleaded, that the plaintiff, within twenty days after the execution of the bond in ſuit, cauſed the memorial in the ſecond plea mentioned to be inrolled in Chancery, and that no other memorial of the ſame bond was inrolled, and that "the "ſaid ſum of 1,400 *l.* in the ſaid condition of the ſaid bond "mentioned to be paid by the ſaid plaintiff to or for the "uſe of the ſaid *W. S., G. S.,* &c. and *Daniel Smith, was* "*not paid by the ſaid plaintiff to and for the uſe of the ſaid* "W. S., G. S., *&c. and* Daniel Smith;" upon which iſſue was joined. The fourth, ſixth, and ſeventh pleas are not material to be ſtated. 5thly, The defendant pleaded, "That the ſaid ſum of 1,400 *l.* in the ſaid condition in "the ſaid bond (in ſuit), and the ſaid memorial mentioned "as the conſideration of and for granting the ſaid annuity "to the ſaid plaintiff, *was not*, nor was any part thereof "*paid on the ſaid 24th day of* December 1796, *as is in the ſame* "*condition and memorial in that behalf alleged;*" and upon this alſo iſſue was joined.

At the trial all the iſſues, except the fifth, were found for the plaintiff, and judgment having been alſo given for the plaintiff upon the demurrer to the ſecond plea, a rule was obtained upon a former day in this term, calling on the defendant to ſhew cauſe why the plaintiff ſhould not be at liberty to ſign final judgment, notwithſtanding a verdict for the defendant on the fifth iſſue: and, on the

1803.

COARE *against* GIBLETT.

other hand, the defendant obtained another rule, calling on the plaintiff to ſhew cauſe why judgment ſhould not be entered for the defendant upon the third iſſue. Both theſe rules came on to be conſidered together; and the facts appeared upon Lord *Ellenborough*'s report of the trial to be, that the plaintiff was ready to have paid the conſideration-money of 1,400*l.* on the 24th of *December* 1796, when all the deeds for granting and ſecuring the annuity were to have been executed. But ſome of the parties not attending to execute them, it was agreed that the conſideration-money, which was in fact delivered by the plaintiff on that day to *Daniel Smith*, one of the grantors then preſent, ſhould be placed by him in a banker's hands in the names of himſelf and of Mr. *Lowe*, the plaintiff's attorney, until all the deeds were executed and ready to be delivered. Accordingly *Lowe* accompanied *Daniel Smith* to the bankers with the money, where *D. Smith* placed it in their joint names, and took an accountable receipt as follows: "Received *December* 24th, "1796, of Mr. *D. Smith* and *J. Lowe*, 1,400*l.* on ac-"count, to account for on demand." (Signed by the bankers.) On the next day the defendant executed the bond in queſtion; and on the 26th of *December* all the other grantors having executed the other inſtruments, *Lowe* accompanied *Daniel Smith* to the bankers, when they gave up the accountable receipt, and *D. Smith* received the 1,400*l.* All the grantors except the defendant were principals.

Erſkine, *Gibbs*, and *Reader*, argued in ſupport of the rule for entering judgment for the defendant on the third iſſue, and againſt the rule for entering judgment for the plaintiff, notwithſtanding the finding of the fifth iſſue for the defend-

ant

ant. 1st, The day of payment of the consideration-money is very material; because, as it affects the value of the consideration, if it be not stated exactly, the consideration itself cannot be said to be truly stated as required by the annuity act (*a*). Now the memorial, by stating the consideration-money to have been paid on the 24th, when in fact it was not paid till the 26th, has stated it to be more valuable than it really was, inasmuch as the grantors had less use of it by two days than appears by the memorial. For this reason, in *Rumball* v. *Murray* (*b*), *Berry* v. *Bentley* (*c*), and *Pool* v. *Cabanes* (*d*), it was holden, that if the consideration of an annuity be paid in promissory notes or bankers' checks, the times when they were payable must be set forth in the memorial, as affecting the value of the consideration. By the 4th sect. of the annuity act, if any part of the consideration stated be *retained*, it avoids the annuity. Now here the whole was retained two days; and if that may be done for so long, why not for much longer. The grantors had no control over the money from the 24th to the 26th. [Lord *Ellenborough* C. J. The word *retained* in the statute must certainly be understood of a retainer to the party's own use, which was not the case here.] The materiality of the day is further marked in this case by the form of the issue, which is, that the 1,400*l.* in the condition of the bond, and the said memorial mentioned, was not paid on the 24th of *December* 1796, *as is in the said condition and memorial in that behalf alleged;* expressly therefore referring to the consideration as stated in the memorial: and in the recital of the bond in the memorial, the consideration is stated to

1803.

COARE *against* GIBLETT.

(*a*) 17 *Geo.* 3. *c.* 26.
(*b*) 3 *Term Rep.* 298.
(*c*) 6 *Term Rep.* 690.
(*d*) 8 *Term Rep.* 328.

have

1803.

COARE *against* GIBLETT.

have been paid on the 24th, the truth of which is disproved by the finding of the fifth issue in the negative. If it be material to state the true day of payment in the memorial, it must be equally necessary to aver it in pleading, otherwise a wrong day would be stated on purpose to mislead. But though an averment of the particular day of payment were irrelevant, yet it having been averred, it must be proved as laid. 2dly, The third issue should upon the evidence have been found for the defendant; for it is an essential part of the annuity act, as settled in *Dalmar* v. *Barnard* (*a*), that the memorial should state the very hand by which the consideration-money was paid to the grantors. Here the memorial states it to have been paid by *Wm. Coare* for their use; the issue is, that it was not paid by him, and in fact it was paid by the hands of *Lowe* and *Wm. Smith*; for *payment* means *ultimate payment* to the parties entitled to receive it, and not a temporary deposit in the names of other persons, though ultimately to be accounted for by them to the parties entitled upon the performance of the stipulated condition. And it appears that when payment was actually made on the 26th, *Wm. Coare* was not present: the *payment* therefore, properly so called, was not made *by him*, but *on his behalf*, to *D. S.*, for the use of himself and the other five persons.

Park and *Holroyd* contrà. The third issue which was found for the plaintiff has no reference either to time or to the annuity act: the form of taking the issue is, "without this, that, &c. *in manner and form as in the* "*plea alleged*:" then unless the time alleged in the plea were material, which it is not here, the question is the

(*a*) 7 *Term Rep.* 248.

same

1803.

COARE *against* GIBLETT.

fame as in any other cafe; and no doubt upon an iffue generally framed whether payment were made by fuch a party, proof of payment by his agent would be fufficient to fubftantiate the allegation. The iffue might indeed have been fo framed as to make the time of payment material with reference to the memorial under the annuity act, as in the fifth iffue; but it is not fo framed. It may however be alfo confidered as payment in fact by *W. Coare* on the 24th; for the money was on that day handed over by him to *D. Smith*, one of the grantors; the plaintiff then ceafed to have any ufe of or control over it; and it was the default of the grantors themfelves that they had not the entire ufe of the money then, nor until the 26th, by their delaying fo long the execution of the deeds. The money being paid by *W. Coare* on the 24th, upon a condition to be performed by the grantors, when the condition was performed it became a payment from that time. As in the cafe of a delivery as an efcrow, if the deed afterwards take effect, it takes effect from the original delivery, and that made by the party himfelf. Next, the plaintiff is entitled to judgment, notwithftanding the finding of the fifth iffue for the defendant, viz. that the payment was not made on the 24th, that being an immaterial iffue. For the annuity act does not require that the exact time of paying the confideration-money fhould be ftated in the memorial, nor was that ever holden to be neceffary. And though the money be ftated in the recital of the bond to have been *this day* (viz. the 24th) paid by *W. Coare*; yet there is afterwards a fubftantive allegation in the memorial of the payment without reference to time; "which "fum of 1,400*l.* was in fact paid to the faid *D. S.*, &c. by "*W. C.*" Then as to the time of payment entering into the value of the confideration, it might be a queftion if the money

1803.

COARE *against* GIBLETT.

money were kept back fraudulently and eo intuitu to leſſen the value of the conſideration-money to the grantor; but there is no pretence of that ſort here: and the words of the 4th clauſe of the act referred to are not "retained for any other *purpoſe*," which the objection ſuppoſes, but "*retained* on any other *pretence*;" which ſhews the meaning of the Legiſlature. The caſe of *Rumball* v. *Murray* (*a*) was very different from this; for there the conſideration was alleged to be paid in *money*, whereas it was in *notes*. In *Berry* v. *Bentley* (*b*) the payment was ſtated to have been made by a *promiſſory note*, which had *ſince* been paid; but when it was made payable, or how long after it was in fact paid, did not appear, except by an affidavit which the Court held could not ſupply the defect of the memorial. The ſame objection applied to *Pool* v. *Cabanes* (*c*). But there are ſeveral caſes to ſhew that where the conſideration of the annuity is in money, the time of paying it is not material to be ſet out in the memorial; as in *Symmons* v. *Mortimer* (*d*), where 1,200*l.* having been paid for the grant of an annuity, and the ſecurities, to prevent their being regiſtered, had been renewed from twenty days to twenty days, and then 600 *l.* more had been paid for the grant of a further annuity, and the ſecurities after other like renewals regiſtered; the memorial ſtating the conſideration for the whole to be 1,800 *l.*, was deemed ſufficient. So in ex parte *Fallon* (*e*), and *Kelſe* v. *Ambroſe* (*f*), money lent and paid at different times, before the granting of the reſpective annuities, was holden to be ſufficiently deſcribed as one entire conſideration of ſo much money. [*Lawrence* J. The only queſtion in the latter caſe was,

(*a*) 3 *Term Rep.* 298. (*b*) 6 *Term Rep.* 690.
(*c*) 8 *Term Rep.* 328. (*d*) 5 *Term Rep.* 139.
(*e*) *Ib.* 283. (*f*) 7 *Term Rep.* 551.

Whether

Whether a *debt* antecedently contracted was not a good consideration *in money* within the annuity act ?]

1803.

COAKE *against* GIBLETT.

Cur. adv. vult.

Lord ELLENBOROUGH C. J. This is a case in which, in a transaction unquestionably fair and honest in all its parts, as far as respects the grantee of the annuity, he is sought to be entangled in certain net-works of the law, from which it will certainly afford us satisfaction to be able justly to disentangle him. The transaction is this; the plaintiff, the grantee of an annuity of 155*l.* 11*s.* 1*d.*, paid the full agreed consideration for that annuity; that is to say, 1,400*l.*, without defalcation of one penny, on *Saturday* the 24th of *December* 1796, the day when the securities, all but one, viz. the bond of the defendant, a surety, were executed, and dated as they naturally would be on that day, and reciting the money as *then* paid. The money was paid on that day by the plaintiff himself to *Daniel Smith*, one of the six grantors, for himself and all the other five grantors; but the bond of the defendant *Giblett*, the surety, not being then executed, the money was turned over by *Daniel Smith* into the hands of the plaintiff's bankers, and there it remained on an accountable receipt given by such bankers for that sum to and in the names of the said *Daniel Smith*, one of such grantors, and a person of the name of *Lowe*, the plaintiff's attorney, till the *Monday*, the 26th of *December*, following, when the deed of the defendant *Giblett*, the surety being executed, the money so impounded in the hands of the bankers was liberated by the plaintiff's attorney signing a check to *Daniel Smith*, to enable him to have the money out of their hands; that is, in effect, by giving up the accountable receipts and by the bankers paying back the

1803.

COARE *against* GIBLETT.

money to *Daniel Smith*, from whom they had immediately and actually received it on the 24th of *December*, the *Saturday* preceding the *Monday*. Upon this ftatement of the tranfaction it appears that the plaintiff divefted himfelf of the money on the 24th; and that the grantors of the annuity would have acquired it immediately and abfolutely, inftead of having only a temporary and fiduciary poffeffion thereof on that day, if the furety's, (*i. e.* the defendant's,) bond had been then executed, as it fhould have been; and that the abfolute vefting of the money beneficially in the grantors of the annuity was only fufpended and poftponed till the act ftipulated to be done as a condition precedent on their part fhould be performed. It has been contended on the part of the plaintiff, by analogy to the cafe of a deed delivered as an efcrow, and to become the deed of the party delivering it afterwards upon the performance of a certain condition, that when the deed of the defendant *Giblett* was afterwards executed (which was the condition to be performed in this cafe) the money became by relation a payment by the plaintiff to the grantors from and at the time of its being originally depofited with the bankers on that condition. And there feems to be good ground upon principle for fo contending. It is laid down in 5 *Co.* 84. *b. Perryman*'s cafe, "That if a man delivers a writing as an efcrow *to be* his "deed on certain conditions to be performed, and afterwards the obligor or obligee dies, and afterwards the "condition is performed, the deed is good; for there was "*traditio inchoata* in the life of the parties; fed *poftea* "*confummata exiftens* by the performance of the condition, "it takes its effect by force of the firft delivery, without "any new delivery." So in the cafe then at bar, a feoffment required by the cuftom of a particular manor to be prefented,

1803.

COARE *against* GIBLETT.

presented, did, when it was presented according to such custom, take effect by force of the livery before. So also *Comyns' Dig.* title *Capacity*, D. 2. "If a woman make a "grant when sole, and deliver the deed as an escrow, to be "her deed upon conditions to be performed; and before "the conditions performed she take husband, and then the "conditions are performed, it will be good; for after "performance it has relation to the delivery;" and cites *Perk. Grant*, 9. I cite these authorities for the principle; although the strict and literal analogy to the case of an escrow does not hold here; because here the delivery or original inchoate payment was made to one of the parties themselves, and not to a stranger; and a deed cannot be delivered as an *escrow*, properly so called, to a party. The principle is, that an inchoate act, which is to be consummate on the performance of a conditional act required to be first done by the party who is the object of such inchoate act, and where the performance rests wholly with such party, becomes, when consummate by the performance on his part of such conditional act, an effectual act for the benefit of the inchoate actor by relation from the time of such his inchoate act done. And upon this principle fairly pursued the payment would be a good payment on the 24th, when the plaintiff paid it upon the condition afterwards performed by the grantors of the annuity. Having stated thus much of the general merits of the case, both in point of fact and law, let us look to the pleadings and issues taken on record.

The declaration is upon a bond of the defendant to the plaintiff, dated the 24th of *December* 1796, in the penalty of 2,800*l.* The defendant, by his plea, craves oyer of the bond and condition; and by the condition, in the introductory or reciting part thereof, it appears that six

1803.

Coare *against* Giblett.

persons by name, of whom *Daniel Smith* and one *Charles Comber* were two, had contracted and agreed with *Wm. Coare*, the plaintiff, to grant him an annuity of 155*l.* 11 *s.* 1 *d.* during the life of the longest liver of those six persons, at the price of 1,400*l.*, *and which sum of* 1,400*l.* *the said* Wm. Coare (*the plaintiff*) *had* THAT DAY *paid to or for the use of the said six before mentioned persons*; and that by a bond of that date the five were bound, and that it was intended that *Charles Comber*, the sixth person, should have been also bound to the plaintiff *Coare* in a bond for 2,800*l.* conditioned for the payment of an annuity of 155*l.* 11 *s.* 1 *d.* by four quarterly payments, on the 24th of *March*, 24th of *June*, 24th of *September*, and 24th of *December*, during the life of the survivor of those six persons. That *Charles Comber* had by accident been prevented from executing that bond with the other five, and that the defendant *Giblett* had at their request agreed to become a surety with them and for *Charles Comber* for the payment of that annuity, in consideration of the sum of 1,400*l.*, therein recited as having been that day paid by the plaintiff *Coare to or for the use of them the six before-mentioned persons*. The condition then proceeded in the common terms of a bond conditioned for the due payment by quarterly payments of such annuity. The defendant, after thus reciting the condition upon oyer thereof, pleaded non est factum. The defendant's second plea states, that the plaintiff, within twenty days after the execution of the writing obligatory, caused a memorial of the same (and *of other instruments therein mentioned*) to be inrolled in Chancery, and then stated the *memorial* at length; which, as far as respects the bond meant to have been executed by the six grantors of the annuity to *Coare* the plaintiff, describes it as " a bond bearing date the 24th of *Decem-*

" *ber*,

" *ber* 1796, whereby the six persons (by their several de- 1803.
" scriptions, but *which bond was not yet executed by the said*
" Charles Comber), in consideration of the sum of
" 1,400*l.* on that day paid to the six, *and which sum of*
" 1,400*l.* *was in fact paid to the said* Daniel Smith *for the*
" *use of himself and the five others;* became bound, &c.;"
and so proceeds correctly to state the condition of that bond, and also of the defendant's bond according to its terms, as they appeared in the former plea upon the oyer thereof: it then concludes (after stating all the instruments inrolled), " which said memorial is not a good and " effectual memorial of the said last-mentioned bond, and " of the consideration of granting the said annuity, ac- " cording to the form of the statute, and that by reason " thereof the writing obligatory in question was void." To *this* plea there was a *demurrer*. The third plea, referring to the memorial set out in the second plea as inrolled in Chancery, as the memorial inrolled of *this* bond, and averring that there was no other memorial thereof, states, " That the said 1,400*l.* *in the condition of the wri-* " *ting obligatory in question, mentioned to be paid by* William " Coare *to or for the use of the six* before-mentioned " grantors of the annuity, *was not paid by the said* William " Coare *to or for the use of the said six persons.*" And upon this fact of payment by *Coare* to the grantors of the annuity of the sum of 1,400*l.* an issue (being the third issue joined on this record) was taken. There was a fourth issue taken upon a fourth plea, upon which no question arises in this case, and which was found for the plaintiff. The fifth plea, after referring as the third did to the inrolled memorial of the bond, alleges, (and upon which the fifth issue on this record was taken,) " That the *said* " *sum of* 1,400*l.*, *in the condition of the writing obligatory*

COARE *against* GIBLETT.

1803.

COARE *against* GILLETT.

" *and in the said memorial mentioned as the consideration* of " and for granting the said annuity to the said *Wm.* " *Coare*, was not, nor was any part thereof, *paid on the* " *24th day of* December 1796, *as was in the condition and* " *memorial in that behalf alleged.*" The issue on the last plea, viz. Whether the 1,400*l.* were paid on the 24th of *December* 1796, was *the only issue which has been found for the defendant.* The plaintiff contends, either that this issue ought to have been found for him, or that this is an immaterial issue; and that judgment ought to be entered generally for the plaintiff, notwithstanding the finding on the issue for the defendant. The defendant contends, that this issue ought to have been found as it is, and that it is not an immaterial one; and also that upon the facts of the case, as appearing upon the judge's report, relative to the payment, that the issue on the third plea *upon the fact of payment* ought to have been found for him, the defendant.

I will consider the effect of these several issues in the order in which they have been severally argued upon, *i. e.* the fifth issue in the first place. And without adding to what I have before said, as to the propriety of considering the issue of payment on the 24th as well proved on the part of the plaintiff, under the circumstances of this case, I will consider how far the issue *on the day of payment* is at all a material one. The stat. 17 *Geo.* 3. *c.* 26., it must be remembered, does not in terms require *the day of actual payment* of the consideration-money to be stated, as it does the *dates* of the *instruments*, the *names of parties*, and *witnesses*, &c.; but it requires *the consideration or considerations of granting the same* to be stated; otherwise all the assurances are to be void. The question, then, is, Is the day on which *this* payment was made so essential

essential a part of the consideration itself, that the consideration cannot be considered as stated, within the meaning of this act, for want of its being stated literally according to the truth. I say *the day* on which *this* payment was made; because as the act does not *in terms* require the day to be stated at all, it can only become necessary to be stated, according to its importance and materiality, as forming an ingredient in the value of the consideration in each particular instance; that is, in other words, only so far as the fact of payment on the one day instead of another is material to the actual value of the consideration as *paid* on the one hand and *received* on the other. In the first place it makes no difference whatever to the plaintiff, the party paying; his money went forth from him, and was separated from his immediate uses of it on the 24th. It makes no difference as to the times of payment of the annuity itself: for those days are fixed by the condition of the bond, independent of the payment of the consideration-money on the one day or the other. Does it make any difference to the party receiving, in respect of which he could by any mode of proceeding in any court have relief in respect to the posteriority of time at which the payment was made, to that which is assigned it by the recital in the condition of the bond? Certainly none; for the postponement was occasioned by the party's own default in not having the present bond ready for execution at the time when the money was not only forthcoming, but forthcame; and of which postponement so occasioned by the parties they are therefore precluded for any effective purpose from complaining. The whole amount of the difference is this, that though the plaintiff did not gain, the grantors of the annuity lost the benefit of two days interest of the consideration-money *by their own default.*

 What

1803.

COARE *against* GIBLETT.

What difference, for any assignable purpose of benefit or relief to the defendant, does it make, whether the payment thus postponed be alleged to be made on the one day or the other? It cannot either way affect the pecuniary rights of the parties one iota. It will always be recollected that in thus construing this requisition of the statute, according to its substance and effect, I am construing one which is not of a specific, precise, and literal kind. Such requisitions as those respecting names of parties, witnesses, trustees, and the like, can only be satisfied by a precise and literal compliance therewith; and nothing which is here advanced can be fairly considered as impugning or weakening the strictness which belongs to those subjects of construction still. What is literally required must be literally satisfied; what is required substantially and by intendment may be substantially satisfied. Upon these grounds I am of opinion that the issue upon the day (if even for the reasons before given it ought not to have been found for the plaintiff, but which I think it ought) is in point of law, under the circumstances stated, an immaterial issue, the finding upon which will therefore not affect the right which the plaintiff has in other respects to a general judgment on this record. As to the issue on the third plea, viz. "that the 1,400*l.* in the "condition mentioned to be paid by *William Coare* "to and for the use of the six before-mentioned grantors "of the annuity, was *not paid* by *the said* William Coare "to or for *the use of the said six persons*;" the objection now taken on behalf of the defendant is, that the 1,400*l.* was *in fact actually and immediately paid by the hands of* Lowe *and* Smith, and not by the hand of *William Coare;* and which it is contended, according to the construction which has in several cases obtained upon the words in the third

 section,

1803.

COARE against GIBLETT.

fection, requiring the name or names "*of the perfon or* "*perfons by whom and on whofe behalf the confideration, or* "*any part thereof, fhall be advanced,*" to be fet forth, ought to have been ftated in the memorial. To this I anfwer, that giving for the prefent the fulleft effect to all thofe cafes, the iffue is in its terms here taken upon the payment *by* William Coare *to the ufe of the fix grantors of the annuity:* and if the payment by *Lowe* and *Smith* was, as in point of law it certainly was, the payment of *Coare*, and would enure as fuch for the purpofe of his difcharge in refpect to any contract to pay that fum, the iffue was well proved on his behalf. The objection is not well raifed on the record, if it were meant fo to be, by alleging that *Coare did not pay;* for in point of law, upon the facts ftated, he *did pay:* but it fhould have been alleged that the fecurities were defective in not ftating the mode in which fuch payment was in fact made by *Coare*, viz. in not ftating that *Coare* paid it *by the hands of* Lowe *and* Daniel Smith. And the ground of this objection fhould have been laid by fpecially alleging by plea the facts which would have fupported it, which has not been done in this cafe; and as it has not, it could not be given in evidence under the terms of the third iffue, framed in the general terms in which that iffue is. For thefe reafons we are of opinion in favour of the plaintiff as to both thefe rules to fhew caufe; and that the firft rule, that the plaintiff fhould be at liberty to fign judgment notwithftanding the verdict for the defendant on the fifth iffue fhould be made abfolute; and that the fecond rule for entering up judgment for the defendant on the third iffue fhould be difcharged.

1803.

Tuesday, June 24th.

Time refused to be enlarged for the bail to render their principal on an affidavit that he could not be removed hither without endangering his life.

WYNN *against* PETTY.

PARK moved that the defendant's bail might have further time to surrender their principal, upon an affidavit of a surgeon that if the defendant were removed from *Lancaster*, where he now was confined by illness, in due time for his bail to render him, it would endanger his life.

The Court had great doubt in the first instance whether such a rule could be granted. They thought that the inconvenience ought rather to be borne by the bail, who must be fixed for not complying with their undertaking, than by the plaintiff, who would otherwise be delayed of his right. And they afterwards referred to a case furnished by the Master, of *Nightingale and others* v. *Lowry*, *E.* 19 *Geo.* 3., where, in proceedings against the bail by scire facias, on the return-day application was made for further time to render the defendant, on an affidavit made by a physician that it would most probably kill the defendant to remove him. But the Court said that it could not be granted, and they must adhere to their rule of Court. That the hardship of a particular case would not justify them in departing from the established practice of the Court; and where one party must suffer by the act of God, they could not interfere.

Rule refused.

1803.

The KING *against* The Inhabitants of EASTBOURNE.

Wednesday, June 22d.

A foreigner may gain a settlement here by occupying a tenement of 10*l.* a year for forty days.

TWO justices by an order removed *Ann Borchert*, and her four infant children by name, from the parish of *Seaford* to the parish of *Eastbourne*, both in the county of *Sussex*. The Sessions, on appeal, confirmed the order, subject to the opinion of this Court on the following case.

Ann Borchert's maiden settlement was in *Eastbourne*. About seven years ago she married one *John Borchert*, a *German*, by whom she had the children mentioned in the order. The said *John Borchert*, with his said wife and children, was, at the time of the removal, resident in a house in *Seaford* of above the value of 10*l.*, which he had rented for two years, exercising therein the trade of a baker. His trade declined at *Seaford*, and he thought he could exercise it with more advantage at *Eastbourne*. The wife and children thereupon became chargeable, and were removed by the above order. The husband acquiesced in every thing which took place with regard to the removal accompanied them to *Eastbourne*, and afterwards continued to reside there with them.

Courthope, in support of the orders. Two questions arise, 1st, Whether a foreigner can gain a settlement in this country? and if not, 2dly, Whether the wife of a foreigner may not be removed to the place of her maiden settlement (*a*)? 1st, It does not appear that a foreigner, though

(*a*) It became unnecessary to consider this question, which seems, however, sufficiently settled in principle by the cases of *St. John's, Wapping*, and *St. Botolph's, Bishopsgate, Burr.* S. C. 367.; *Ironaston* v. *Painswick, ib.* 153.;

1803.

The KING *against* The Inhabitants of EASTBOURNE.

though subject to the laws of this country while domiciled here, could have been within the view and intent of the legislature in framing the system of the poor-laws; for the professed object of those laws was to make a permanent provision for the support of the poor of this kingdom in particular, and not of all foreigners who might choose to come here, for whom another system of laws has been framed, which entitles them to protection under certain regulations, but not to support. And therefore in the case of *St. Giles* v. *St. Margaret* (a), where the question was, Whether an *Englishwoman*, the wife of a foreigner, continuing unremoveable in a parish with her husband for forty days, gained a settlement? Lord *Holt* held, not; and added, "that he did not know that a foreigner had a right to be maintained in any place to which he came; but that they might let him starve." [Lord *Ellenborough* C. J. We owe it to the memory of Lord C. J. *Holt* to believe that he never uttered such a sentiment.] The question is, Whether the laws which give a benefit and interest to the poor in a certain fund for their support are applicable to foreigners? if they be not, the overseers have no authority to distribute relief to them out of it. The proper objects of relief have so far a legal interest in the fund, that means are given to compel such relief, if withheld by the overseers. This is an *interest*, beyond a mere *submission* to the law, which alone a foreigner, during his residence, is bound to give: it is an

R. v. *Pigher Walton*, *ib.* 162.; *Heylandswain* v. *Carleton*, *ib.* 813; and *St. Michael's* v. *Nunny*, *ib.* 815.; if the husband's *acquiescence*, as it is stated, be taken to be a *consent* on his part to the removal of his wife from the parish where he then was.

(a) *E.* 2 *Geo.* 1. 1 *Sess. Cas.* 97. 3 *Burn's Just.* tit. *Poor* (Overseers), *s.* 1.

interest

interest transferable to his children and family. And it would be incongruous to suppose that though a foreigner departed and became an active alien enemy, yet if he left a family behind him, they might compel support from any parish they might choose to go into, which would leave no means of removing them elsewhere. The object of the poor-laws is to prevent vagrancy. The stat. 13 & 14 *Car.* 2. *c.* 12. the principal statute for conferring settlements, is intitled "An act for the better relief of the poor "of *this kingdom*," and speaks of the places where they were previously settled; and it afterwards uses the relative term *such* poor persons, which must refer to the poor of *this kingdom*, that is, *England* and *Wales*. Before that statute, a residence of forty days gave a settlement; which Lord *Holt* thought did not apply to the case of a foreigner, because there was no place to which he could be sent; and the stat. 13 & 14 *Car.* 2. *c.* 12. says, that "on complaint within forty days after any person shall come to settle, &c. two justices may remove him to the place where he was last legally settled for forty days." Then the stat. 1 *Jac.* 2. *c.* 17., which directs that the forty days should be reckoned, not from the time of a person's coming to inhabit in the parish, but from the delivery by him of notice in writing of such inhabitancy, is restrictive of settlements, and does not give any to one who could not acquire it before. Then if a foreigner could not gain a settlement by notice and residence for forty days, he could not by apprenticeship, or by hiring and service, or by rating, or by serving an annual office in the parish; for all these are by the stat. 3 *W.* 3. *c.* 11., which is a restrictive statute, substituted in lieu of notice and residence. Another leading object of the poor-laws, also inapplicable to foreigners, is the binding of apprentices, which is compulsory

1803.

The KING *against* The Inhabitants of EASTBOURNE.

1803.

The King *against* The Inhabitants of Eastbourne.

compulsory on poor parents, not able to maintain them without parochial relief: such children may be bound to the sea service, and, in the event of war with their proper country, may be compelled to become traitors to it, and exposed to capital punishment, which could never have been intended by the legislature. By the stat. 1 *Ed.* 6. *c.* 3. *s.* 13. (*a*), foreign *vagrants* were to be sent to the ports nearest to their own country, to be from thence shipped off. [*Le Blanc* J. Was not that on a supposition that they had not gained settlements in this country?] The legislature must have supposed that foreigners could not have gained settlements here, otherwise the provision would have been confined to foreigners not having a settlement here. Again, none of the laws relating to parish certificates can apply to foreigners. [*Lawrence* J. The same observation would apply to *Scotchmen* and *Irishmen*, who, without dispute, may gain settlements here.] There are no conflicting duties, however, in the instances of such persons.

Garrow and *D'Oyly*, contrà, were stopped by the Court.

Lord Ellenborough C. J. With respect to the compulsory binding of poor apprentices to the sea service (*b*), as this may apply to the merchant service, and is not directed to be on board men of war, it does not necessarily follow that conflicting duties will arise in the case of a foreigner's child so bound, any farther than as he may be afterwards impressed, which may equally happen to be the case of any other foreign seaman. However,

(*a*) This statute is set forth in the Appendix to *Runnington*'s edition of the *Statutes*, vol. 10. p. 139.; and vide *ib.* p. 143. the stat. 3 & 4 *Ed.* 6. *c.* 16. *s.* 16.

(*b*) By stat. 2 & 3 *Ann.* *c.* 6.

no

no difficulty of that sort attaches on the present case. This man was not an alien enemy, but a *German* by birth, an alien amy. And as such, though he may not take a lease of a dwelling-house or shop, by reason of the statute 32 *H* 8. *c*. 16. (*a*), yet he may occupy a tenement of 10 *l*. a year, and carry on his trade there like any other person. Then if he may do so, he has that interest which enables him to gain a settlement by the provision of the legislature. As to there being no obligation for maintaining poor foreigners before the statutes ascertaining the different methods of acquiring settlements, the law of humanity, which is anterior to all positive laws, obliges us to afford them relief, to save them from starving; and those laws were only passed to fix the obligation more certainly, and point out distinctly in what manner it should be borne.

1803.

The KING *against* The Inhabitants of EASTBOURNE.

Per Curiam, Both orders quashed.

(*a*) His Lordship afterwards referred to Mr. Serjt. *Williams*'s observations on this statute in his notes on the case of *Jevens* v. *Harridge*, 1 *Saund*. 8. and 2 *Show*. 235. there referred to.

FENTIMAN *against* SMITH.

Thursday, June 23d.

IN an action on the case for diverting a water-course from the plaintiff's mill, the declaration stated that whereas the plaintiff on the 1st of *January* 1803, and long before, was and still is *lawfully possessed of a certain cotton mill, with the appurtenances*, situate at *Addingham* in the

Where one declared in case for obstructing a water-course, upon his *possession* of a mill *with the appurtenances*, and that *by reason of such his possession he had a right to the use of water running in a certain tunnel to the mill*; such allegation is not supported by proof that the tunnel was made on the defendant's land, which he had agreed to let the defendant have for this purpose for a certain consideration, but of which no conveyance was made by him to the plaintiff, and he had since refused assent: because the plaintiff had not the water by reason of his *possession* of the mill, &c. but by parol licence or contract, which could not pass the title to the land, and as a licence was revocable, and revoked.

1803.

FENTIMAN *against* SMITH.

the county of *York*, near to two certain rivulets there called the *Town Beck* and the *Back Beck*, the water of which rivulet called the *Back Beck* until the interruption complained of had flowed into and ſtill of right ought to flow into the *Town Beck* by means of a certain tunnel or goit there above the plaintiff's wear there erected acroſs the *Town Beck* a little above the ſaid mill; and the plaintiff *by reaſon of his poſſeſſion of the ſaid mill*, during all the time of working the ſame, of right ought to have had, and ſtill of right ought to have, the uſe and benefit of both the ſaid rivulets called the *Town Beck* and *Back Beck*: yet the defendant knowing the premiſes, and to deprive the plaintiff of part of the uſe and benefit of his ſaid mill with the appurtenances, whilſt the plaintiff was ſo poſſeſſed thereof as aforeſaid at, &c. cut a channel, &c. whereby the water of the *Back Beck* was diverted from running into the ſaid tunnel or goit, and ſo to the mill, and the plaintiff was prevented from working his ſaid mill, &c.

At the trial before *Rooke* J. at the laſt aſſizes at *York*, it appeared in evidence that the tunnel or goit which was made and fixed into the ground with ſtone-work, had been made in part over an old road purchaſed by the defendant about eight years ago for a guinea, who at that time agreed for the ſame price to let the plaintiff lay the tunnel there for the purpoſe of conveying the water to the mill; that the defendant even aſſiſted at the making of the tunnel under the plaintiff's directions; but no conveyance was made of the land to the plaintiff. The guinea was afterwards tendered to the defendant, but he refuſed to receive it or to give his aſſent to the continuance of the tunnel, and made the obſtruction complained of. It was objected on the part of the defendant, that the plaintiff ought to be nonſuited, this being a right claimed in or over the land,

which

1803.

FENTIMAN *against* SMITH.

which could not paſs by parol licence without deed, and the declaration ſtates that the plaintiff had a right to the goit *by reaſon of his poſſeſſion of the mill*, whereas it appeared that he had it by virtue of the agreement. But the learned Judge refuſed to nonſuit the plaintiff, on the ground that as the agreement was made in reſpect of the mill, and as it might be diſputable whether if the mill were taken away the plaintiff could have a right to the water for other purpoſes, the declaration ſtated the right with ſufficient correctneſs, and his claim might be ſupported without deed: but reſerved the point. The defendant then called witneſſes, and there was a verdict for the plaintiff with nominal damages.

Park and *Topping* ſhewed cauſe ſhortly againſt a rule for ſetting aſide the verdict and entering a nonſuit, on the ground that it was ſufficient for the plaintiff againſt a wrong-doer to declare upon his *poſſeſſion* of the mill with the appurtenances. But

Lord ELLENBOROUGH C. J. ſaid, that ſuch an allegation could not be ſuſtained without ſhewing that the *appurtenances* were *legally* ſuch. Now here the title to have the water flowing in the tunnel over the defendant's land could not paſs by parol licence without deed; and the plaintiff could not be entitled to it, as ſtated in the declaration, by reaſon of his *poſſeſſion of the mill*, but he had it by the licence of the defendant, or by contract with him; and if by licence, it was revocable at any time. The enjoyment with the defendant's aſſent was not left as evidence to the jury to preſume a grant; but it was ſuppoſed that it gave a title in point of law, which it clearly did not.

Per Curiam, Rule abſolute.

Cockell Serjt., *Holroyd*, and *Hardy*, were to have ſupported the rule.

1803.

Monday, June 27th.

HEATH *against* HUBBARD.

Under the ship-register acts (26 *G.* 3. *c.* 60. and 34 *G.* 3. *c.* 68) a bill of sale transferring the property to a trustee in trust for the underwriters not named, is at most only void (if at all) as to the objects of the trust, but sufficient to convey the legal title to the trustee; and such bill of sale of a ship at sea is valid, notwithstanding the omission of the officer at the outport to which the ship belonged, to indorse the entry of the transfer on the oath on which the original certificate of registry was obtained, and to make a memorandum thereof in the book of registry, and to give notice of the same to the commissioners in *London*, as required by *s.* 16. of the stat. 34 *G.* 3. *c.* 68.; such acts to be done by the public officer being only *directory*. But the delivery of a copy of the bill of sale of a ship at sea for the purpose of making such entry and memorandum and giving such notice, being an act required to be done by the party himself to whom the transfer is made, for want of which the statute avoids the sale, must be complied with in order to convey the property: and therefore the purchaser under such circumstances having omitted to do so, cannot make a title to the ship per saltum by getting her registered de novo in another port where he resided at the time: for whatever may amount to a *transfer of a ship to another port* within the meaning of the statutes, at all events such transfer cannot be made by one who has no interest in the ship. Semble, that a sale of the whole of a ship by one who is only a part owner, in exclusion of the right of another who is tenant in common with him, is not equivalent to the *destruction* of the subject-matter mediately or immediately, so as to enable his co-tenant to maintain trover against him for it.

THIS was an action of trover brought to recover one-third part of the ship *Fishburn*. At the trial at *Guildhall* before Lord *Ellenborough* C. J. on the 1st of *November* 1802, a verdict was taken for the plaintiff for 1,210*l.*, subject to the opinion of the Court on the following case:

Thomas Ward, being the original and sole registered owner of the ship *Fishburn*, belonging to the port of *Newcastle-upon-Tyne*, cleared the said ship outwards for the *Baltic* in *April* 1800, and effected an insurance on one-third part of the said ship for 2000*l.*, with an insurance club of underwriters at *South Shields*, in a policy in which the said ship was valued at 6000*l.* The ship was embargoed by the Emperor of *Russia* at *Riga* in the spring of 1801, and thereupon *Ward* abandoned the said one-third part to the underwriters, and received from them respectively payment of a total loss. Thereupon, by a bill of sale dated the 7th of *March* 1801, but executed on the 11th of *April* 1801, between *T. Ward* on the one part, and the plaintiff *Heath* on the other part, reciting the certificate of registry of the said ship, and also reciting the embargo and the consequent abandonment thereon; *Ward*, in considera-

tion

1803.

HEATH *against* HUBBARD.

tion of 2000*l.* therein expressed to be paid by the underwriters, assigned and transferred to the plaintiff 20/60th parts of the ship, to hold the same in trust for all the underwriters on the ship by the policy of 2000*l.* in proportion to their respective payments. The name of none of the underwriters is mentioned in this bill of sale. On the 14th of *September* 1801 the plaintiff transmitted to the collector and comptroller of the customs at *Newcastle-upon-Tyne* a copy of the said bill of sale, who on the same day caused an entry thereof to be indorsed on the oath on which the original certificate of registry of the ship had been obtained by *Ward*, and also caused a memorandum of the same to be made on the books of registers of that port. No notice thereof however was given to the commissioners of his Majesty's customs until the 24th of *January* following. It is the practice of the collector and comptroller of the customs at *Newcastle-upon-Tyne*, in pursuance of the orders of the commissioners, to make quarterly returns to them in the months of *January*, *April*, *July*, and *October*, of all transfers of property in registered ships; and a quarterly return was accordingly made in the month of *October* 1801; but in that return no notice was taken of the said transfer of one-third part of the ship *Fishburn*. On the 9th of *November* 1801 *Ward*, by regular bill of sale, assigned the whole ship *Fishburn*, in consideration of 4000*l.*, to the defendant, who then resided in *London*, and who on the 2d of *January* 1802 registered the said ship de novo in the port of *London*, when the original certificate granted to *Ward*, which purported on the face of it to be of the ship *Fishburn*, belonging to the port of *Newcastle-upon-Tyne*, was delivered up and cancelled. At the time of the assignment by *Ward* to the defendant, the grand bill of sale of the whole ship was de-

 livered

1803.

HEATH *against* HUBBARD.

livered to the defendant. On the 3d of *February* 1802, the defendant having advertifed an intended fale of the whole of the faid fhip by public auction, the plaintiff caufed notice to be given to the broker of his title to one-third of the fame, and required the defendant to permit a proper indorfement of the faid bill of fale made to the plaintiff to be made on the original certificate of regiftry; and alfo required the defendant not to fell the faid one-third part; but the defendant neverthelefs on the 19th of *February* fold the whole of the faid fhip by public auction to *T. Brown*, *R. Brown*, and *T. Old*, for 3,630 *l.*; and by bill of fale of the 5th of *April* 1802 affigned the whole of the faid fhip to them. The net proceeds of the faid fale received by the defendant amounted to 3,489 *l.* 10 *s.* 5 *d.* The *Fifhburn* never has been in the port of *Newcaftle-upon-Tyne* fince fhe cleared outwards from that port for the *Baltic* in *April* 1800: but the embargo being taken off, fhe returned to *Plymouth* after the execution of the bill of fale by *Ward* to the plaintiff, and before the execution of the bill of fale by *Ward* to the defendant fhe failed again, and was abfent at the time of the execution thereof. It was immediately on her return that the defendant obtained the new regifter. The plaintiff had no knowledge of the fhip's return. No transfer of property in the fame fhip, or any part thereof, appears in any document at the cuftom-houfe of *Newcaftle-upon-Tyne* fubfequent to the above-mentioned entry and memorandum made on the 14th of *September* 1801, and no indorfement of the tranf-fer of one-third of the fhip to the plaintiff was ever made on the original certificate of the fhip's regiftry. The queftion for the opinion of the Court was, Whether the plaintiff were entitled to recover in this action? If the Court fhould be of opinion that the plaintiff was entitled

to

1803.

HEATH *against* HUBBARD

to recover, then the verdict to ftand: but if the Court fhould be of opinion that the plaintiff was not entitled to recover, then a nonfuit to be entered. The cafe was argued in *Hilary* term laft by

Hall for the plaintiff. Three objections have been fuggefted to the plaintiff's right to recover: 1ft, That the bill of fale to him, being in truft for *unnamed* perfons, could not be fupported, as tending to defeat the regifter acts 26 *Geo.* 3. *c.* 60. and 34 *Geo.* 3. *c.* 68. by enabling foreigners under colour of trufts to acquire property in *Britifh* fhips. 2d, That the plaintiff's title was not perfected before the affignment of the fhip to the defendant for want of proper entries and notice of the transfer by the officer at *Newcaftle* to the commiffioners of the cuftoms in *London*, as required by the latter ftatute, and alfo for want of the delivery of the grand bill of fale of the fhip by *Ward* to the plaintiff at the time of the transfer. 3d, That the plaintiff and defendant were at all events tenants in common, and therefore trover will not lie. As to the firft, it is found that in fact the conveyance to the plaintiff was made in truft for *Britifh* underwriters, and not to cover the interefts of foreigners, and therefore no attempt to evade the policy of the regifter laws. The objection then is no more than what may be urged againft every other conveyance, that under colour of a true and legal tranfaction a fraud may be committed. But at any rate it is fufficient to fay, that it is cafus omiffus in the act. The ftat. 34 *Geo.* 3. *c.* 68. *f.* 14. (a provifion made in confequence of the doubt thrown out in *Rollefton* v. *Hibbert* (*a*),) requires the transfer of fhips to be *in writing*,

(*a*) 3 *Term Rep.* 412.

 but

1803.

HEATH *against* HUBBARD.

but it does not point out any particular form of a bill of ſale; and this Court cannot take notice of truſts, but can only look to the legal title. In *Camden and others* v. *Anderſon* (a) the Court would not permit four plaintiffs, partners, to recover againſt the underwriter the amount of an inſurance, it appearing that the legal title to the ſhip under the regiſter acts was only in two of them. Nor can the property in a ſhip be otherwiſe deveſted than by a legal conveyance within theſe ſtatutes. *Weſterdell* v. *Dale* (b). It may be ſaid that the oath of ownerſhip required by the ſtat. 26 *Geo.* 3. *c.* 60. *ſ.* 10. is conceived in terms to exclude any ſuch truſt as this; but that is only required on the original regiſtry of the ſhip, or at leaſt when a new regiſter is to be made, and not upon every intermediate transfer like the preſent. Beſides, the ſubſtantial part of the oath is, that no foreigner is intereſted in the ſhip. But even if this were a truſt for foreigners it would not avoid the transfer itſelf; for the Legiſlature did not intend to prohibit the ſale of *Britiſh*-built ſhips to foreigners; but only to prevent them from having the privilege of *Britiſh* ſhip-owners after ſuch transfer: and therefore the 15th ſect. of the 26 *Geo.* 3. *c.* 60. provides, that a bond ſhall be given by the owner at the time of the regiſtry, that if any foreigner ſhall become entitled to any ſhare in the ſhip, the certificate of regiſtry ſhall be delivered up to be cancelled. The ſecond objection is founded, firſt, upon the neglect of the officer at *Newcaſtle* in not making a return of the transfer to the commiſſioners in *London* in proper time; but that is merely directory, and not neceſſary to the validity of the transfer. Sect. 15. of the 34 *Geo.* 3 *c.* 68. provides for the transfer of ſhips in

(a) 5 *Term Rep.* 709. (b) 7 *Term Rep.* 306.

port,

1803.

HEATH *against* HUBBARD.

port, as sect. 16. does for those at sea: the latter must be construed with reference to the former. If any of the requisites are not complied with, the conveyance is made void; which can only be meant to apply to such acts as are required to be done by the party himself, and cannot extend to wilful or negligent omissions of the public officers. The entering of the transfer with the officer of the customs at the out-port is imperative on the owners of a ship at sea; but the notice also required to be given by such officer to the commissioners in *London* can only be directory. By sect. 16. such notice is required to be given *in the manner therein-before directed*, which refers to the 15th section, which in the very terms of it is only directory to the public officer, and where the direction is introduced after the vacating branch of the clause upon the omission of those things required to be done by the owner. The two clauses are to be construed with reference to the same vacating provision reddendo singula singulis. This construction is supported by *Ratchford* v. *Meadows* (*a*). And *R.* v. *Gainsborough* (*b*) proceeded on the same principle; where it was ruled, that an apprentice should not be prejudiced in gaining a settlement by the neglect of his master to enrol the indentures, though the stamp duties were thereby evaded. The next branch of this objection, viz. that the grand bill of sale of the ship was kept by *Ward* at the time of the transfer, and not delivered to the plaintiff, is founded upon what was said in *Moss* v. *Charnock* (*c*), that the grand bill of sale ought to be delivered by the vendor to the vendee at the time of the sale. There however the *whole* interest in the ship was assigned; whereas here the property was divided, and the plaintiff

(*a*) 3 *Espin. N. P. cas.* 69. (*b*) *Burr.* S. C. 586. (*c*) 2 *East.* 399.

1803.

HEATH *against* HUBBARD.

having the leſſer intereſt was not entitled to the original title-deed of the ſhip. It may alſo be objected from the ſame caſe, that the plaintiff did not immediately ſend down the new bill of ſale to the port officer at *Newcaſtle*; but the not doing ſo was in his own delay, and it is ſufficient that it was done before the conveyance to the defendant, that is, according to the ſame authority before the rights of third perſons intervened. The third objection, that the plaintiff and defendant are at leaſt tenants in common, depends upon the defendant's title: but firſt, he had no title; and next, if he had, yet having done that which is equivalent to the deſtruction of the thing in common, trover will lie. 1ſt, The ſhip *Fiſhburn* being regiſtered in the port of *Newcaſtle*, it was incumbent on the defendant before he took the aſſignment of her to have inquired there in whom the property was veſted; inſtead of which he took an abſolute bill of ſale from *Ward* in *London*, and regiſtered the ſhip de novo in that port, which could not be done under the regiſter acts but only in the port to which the ſhip belonged at the time. Suppoſing the commiſſioners in *London* had conſented that a new certificate of the regiſtry ſhould be made out under the 20th ſection of the 34 *Geo.* 3., yet they could not do it themſelves, but could only order it to be made by the proper officer, who according to the whole tenor of the acts muſt be the officer in the port to which the ſhip belongs. But, 2dly, ſuppoſing the defendant's title to be made out, yet the ſale by him of the whole ſhip, and that after-notice of the plaintiff's right, was equivalent to a deſtruction of the property held in common, in which caſe trover will lie. The caſes on this ſubject are collected in a note of Mr. Serjt. *Williams* to the caſe of *Wilbraham* v. *Snow* (*a*). As in

(*a*) 2 *Saund.* 47. (g.)

1803.

HEATH against HUBBARD.

in *Co. Lit.* 200. " If two tenants in common be of a dove-" house, and one deftroy the old doves, whereby the " flight is wholly loft, the other fhall have trefpafs," &c. So if one of two tenants in common of a park deftroy all the deer. So in *Barnardifton* v. *Chapman* (*a*), where one tenant in common of a fhip took it away and fent it to the *Weft Indies*, where it was loft in a ftorm; in trover, Lord *King* left it to the jury whether this were not a deftruction by the defendant, who found it fo accordingly. The fame principle is recognized in 14 *Vin. Abr.* tit. Jointenants, S. a. which cites *Crofs* v. *Abbot* (*b*), and refers to *Bro. Trefp. pl.* 63. and 47 *Ed.* 3. 22.; and in *Fifhar* v. *Proffer* (*c*), where Lord *Mansfield* faid, " If upon de-" mand by a co-tenant in common of his moiety the other " denies to pay, *and denies his title*, faying he claims the " whole, and will not pay, and continues in poffeffion, " fuch poffeffion is adverfe and oufter enough:" *i. e.* to maintain ejectment, which, generally fpeaking, one tenant in common cannot maintain againft his co-tenant. So here, the denial of the plaintiff's title, and a fale by the defendant of the whole fhip as his own, operates as an oufter of the plaintiff's poffeffion, and deftroys the tenancy in common.

Abbott, contrà, waving any objection to the plaintiff's title, by reafon of the non-delivery to him of the grand bill of fale; and waving alfo, upon the authority of *Mofs* v. *Charnock* (*d*), any objection on the ground of the plaintiff's negligence in not regiftering his bill of fale for fo long as fix months, there being no time limited in the regifter acts for doing the act, and that cafe having decided that

(*a*) *Bull. N P.* 34, 35. Vide S. C. *poft*, 121. (*b*, *Noy*, 14.
(*c*) *Cowp.* 213. (*d*, 2 *Eaft* 399.

 it

1803.

HEATH *against* HUBBARD.

it is ſufficient if it be done before the rights of third perſons intervene: and waving alſo, upon the authority of *Ratchford* v. *Meadows* (*a*), any objection to the plaintiff's title founded upon the neglect of the port officer at *Newcaſtle*, in omitting to give notice of the transfer to the commiſſioners in *London*; reduced the argument to two points; 1ſt, contending that the plaintiff was not the legal owner of any intereſt in the ſhip; 2dly, ſuppoſing that he were, ſtill that he was not entitled to maintain the preſent action of trover. 1ſt, The general policy of the regiſter laws is very important to be preſerved, and muſt not bend to the inconvenience which may ariſe from their obſervance in particular caſes: but the diſtinction between legal and equitable titles cannot be admitted without overturning the whole ſyſtem. Accordingly, no perſon can be the legal owner of a ſhip but one who is beneficially intereſted in it, and whoſe name appears in the documents required by thoſe acts. No perſon could doubt the meaning of the word *owner* therein uſed, except on nice legal diſtinctions which ought not to have place; but not being a technical word, it ought to be conſtrued according to its popular acceptation, for the notoriety of which it was adopted. *Owner* is ſynonymous to *proprietor*, and is coupled with it in *ſ.* 10. and 11. of the 26 *Geo.* 3. *c.* 60., which require the oath of ownerſhip to be taken, which oath can only be taken by thoſe who are benefically intereſted. If this be ſo, which is not denied, with reſpect to the original owners, it would be abſurd to conſtrue the ſame word differently as applied to ſuch as become owners by a ſubſequent tranſfer. This is evidently the meaning of the legiſlature, upon a review of the whole ſyſtem of theſe laws, the

(*a*) 3 *Eſp. Ni. Pri. Caſ.* 69.

leading

leading object of which was to encourage *British* shipping and *British* seamen. The first act requiring the registry of ships was the stat. 12 *Car.* 2. *c.* 18.: the 10th section of which, for preventing frauds in colouring or buying of ships, provides that no foreign-built ship shall enjoy the benefit or privilege of an *English* ship, until he or they claiming such ship shall *make appear* to the chief officer of the customs in the port next to their place of abode, "*that he or they are not aliens*, and shall have *taken an oath* "before, &c. that such ship was bonâ fide and without "fraud *by him or them bought*, &c., and *who* are his *part-* "*owners*, if any, *all which part-owners shall be liable to take* "*the said oath, and that no foreigner, directly or indirectly,* "*hath any part, interest, or share therein.*" This was followed up by the stat. 7 & 8 *W.* 3. *c.* 22. for the regulation of the plantation trade, the 17th section of which gives the form of the oath, binding the parties to state the names of all the then owners, with the like exclusion of the interest of any foreigner in the ship. The leading statute, however, is the 26 *Geo.* 3. *c.* 60., which (*s.* 9 & 10.) abrogates the old and gives a new oath, the form of which requires the names of *all* the part-owners to be stated, "and that no other person or persons whatever hath or "have any right, title, interest, share, or property therein "or thereto." It is plain, therefore, that if this had been the case of an original registry, or any other wherein the oath was required to be taken, the plaintiff, as a trustee, could not have taken it. So neither can it be taken in the case of a transfer of property. The first provision for such transfers was made by the stat. 7 & 8 *W.* 3. *c.* 22. the 21st section provides, that in case of the alteration of property in any ship in the same port, such transfer shall be indorsed on the certificate of registry before two wit-

1803.

HEATH *against* HUBBARD.

1803.

HEATH *against* HUBBARD.

nesses, *in order to prove that the entire property in such ship remains to some of the subjects of* England, if any dispute arise concerning the same. It is said that no new oath is required in that case; but that regulation shews that the legislature relied on the original oath; and if upon such transfer the beneficial interest may be in any other than the nominal owner, the indorsement cannot prove that which the legislature intended it to do. Then the stat. 34 *Geo.* 3. *c.* 68. *s.* 15. recites the last mentioned clause of the statute of King *William*, and provides further, that such indorsement on the certificate of registry shall be made in a given form, including the names, residence, and occupation of the vendors and purchasers, "to be signed by the persons transferring *the property* of "the said ship." Now the *purchaser* must mean the person who pays the money, and not merely him to whom the conveyance is made. The 16th section (*a*), which provides for the sale of ships at sea, directs the securities and notices to be made and given, "in the manner therein-"before directed;" and as this is only a substitution of one mode of conveyance *cy pres* for another, it follows that the word *owner* must be used in the same sense as before, as meaning the person beneficially entitled; in which case the plaintiff is not the owner of the ship in question within the meaning of these acts. [*Lawrence* J. May not the trust be void, and the property vest in the plaintiff absolutely? or, supposing two contract for the purchase of a ship, and the money be paid by both, but the conveyance be made to one only, would not the legal title vest in him, and be out of the vendor? In *Camden* v. *Anderson* (*b*), it seemed not to be disputed, but that the pro-

(*a*) An erratum was noticed in the printed statute, *l.* 3. of this clause; "Indorsement *or* certificate," *for* indorsement *on* the certificate."

(*b*) 5 *Term Rep.* 709.

perty

1803.

HEATH *against* HUBBARD.

perty might so vest. In the case of a bankruptcy, the assignees are only trustees for the creditors at large, and would it be necessary for the commissioners to assign to all the creditors?] In the latter case the trust is created and recognized by act of parliament. [*Lawrence* J. Supposing a person in insolvent circumstances is desirous to convey his property in a ship for the benefit of all his creditors, must they be all named?] There may be a distinction between a conveyance to a trustee in trust merely to sell, and an absolute conveyance for all purposes. This is a trust generally *for the benefit* of the underwriters. [*Lawrence* J. The property must first vest in the trustee before he can convey to others.] Then, secondly, Supposing the plaintiff to be a legal owner of part, he cannot maintain trover against his co-tenant in common. The sale of a thing can never be deemed equivalent to the destruction of it: it still exists in specie. The attempt of the defendant to transfer the whole was merely invalid as to one-third. All the cases shew that nothing short of the actual destruction of the subject-matter will sustain the action by one tenant in common against another. *Doe d. Fishar* v. *Prosser* (*a*) is clearly distinguishable, the question there affecting the *realty*, which admits of an ouster in law. He then read the following note of *Barnardiston* v. *Chapman* (*b*), from Ld. C. J. *King*'s MS.

[" *C. B. Hil.* 1 *Geo.* 1. *Barnardiston* v. *Chapman and Smith*, *Feb.* 29th, before Lord C. J. *King*, *Tracy* and *Dormer* Js. Trover for a ship, tried in *London* last *Michaelmas* term, before *King* Ch. Justice, whereon the following case was made.—*Alexander Fraser*, being owner of a ship called the *Triton*, on the 2d day of *May* 1713, by bill of sale

(*a*) *Cowp.* 217. (*b*) Before cited from *Bull. N. P.* 34, 35.

sold

1803.

HEATH *against* HUBBARD.

sold a moiety of the said ship by way of mortgage to the plaintiff for 100*l*., and afterwards, by several bills of sale, sold one moiety of the whole to one of the defendants, and the other moiety of the whole to the other defendant; and the said defendants had the said ship for some time in their possession, and repaired the same. The money mentioned in the bill of sale to the plaintiff not being paid, the plaintiff had afterwards possession of the ship. The defendants by force took the ship out of the plaintiff's possession and carried it away.—The single question intended to be made on this case was, Whether the plaintiff, who was tenant in common of one moiety of the ship, could maintain this action of trover against the other tenants in common for taking the ship out of his possession by force and carrying it away? and, on hearing counsel on both sides, we held, That if one tenant in common of a personal indivisible chattel bring trover against a stranger, if the stranger do not plead the tenancy in common in abatement, he can have no benefit of it in evidence upon the general issue: That if one tenant in common destroy the said thing in common, the other tenant in common may bring trespass or trover against him; and therefore, in this case, if the defendants had burnt or destroyed the ship, this action would have been maintainable against them: That where one tenant in common doth not destroy the thing in common, but only takes it out of the possession of the others, and carries it away, there no other action lies by the other tenant in common: which being this case, we held this action would not lie.

"Precedents to warrant this distinction were, *Noy*, 14. *Fitz. Trespass*, 233. 11 *H.* 4. 13. *Fitz. Brief*, 674. *Co. Lit.* 200. *a.*, and the text of *Littleton* there. 47 *E.* 3. 22. 2 *H.* 5. 3. 1 *Fitz. Trespass*, 212. *Brief*, 927. 13 *H.* 7.

26.

26. *F. N. B.* 127. *a.* 3 *Keb.* 785. *Masters* v. *Pooley*, 2 *Roll. Rep.* 207. 2 *Roll. Abr.* 566. *Godb.* 282. *Graves* v. *Sawcer*, *Raym.* 15. 1 *Lev.* 29. 1 *Keb.* 38. 1 *Sid.* 49.

"But then it was objected that the title of the defendants was by several bills of sale, and that, by consequence, he to whom the first bill of sale was made had the entire property of the moiety that was not in the plaintiff; and by consequence one of the defendants was a stranger, and the action maintainable against him. But this being no question at the trial, and it not appearing which of the defendants had the posterior bill of sale, we would not let the plaintiff have the postea. But the main point for which the case was made being against him, we proposed, and so it was agreed, that the plaintiff should pay the defendants 5*l.* as the costs of the trial, and the verdict taken for the plaintiff's security should be set aside, and he should be at liberty to try the whole again: and the cause was tried the long vacation after, before me, in *London.*—*C. B. Pas.* 1 *Geo.* 1. at Nisi Prius, post. Termin. *S. Trin.* 1 *Geo.* 1.

"It then appeared that the plaintiff was tenant in common of one moiety of the ship called the *Triton*, and the defendants tenants in common of the other moiety: and the ship being in the possession of the plaintiff, the defendants forcibly took it out of the plaintiff's possession; secreted it from him, so that he knew not where it was carried; changed the name of the ship, which afterwards came into the possession of one *Dean*, who sent it to *Antigua*, where the ship sunk, and was entirely lost. And the plaintiff's counsel insisted that the thing in common being thus destroyed, the defendants were to answer for it to the plaintiff. But the defendants' counsel insisted, that one tenant in common is only answerable to the other

tenant

1803.

HEATH *against* HUBBARD.

tenant in common for an actual destruction, to which *King* C. Just. agreed; but left it to the jury, upon the whole circumstances of the case, Whether, by the defendants' force, the ship was actually taken from the plaintiff, and secreted, and carried out of his power to preserve the ship? and a destruction happening in those circumstances, Whether it should not be found to be a destruction by the defendants' means? which the jury accordingly found, and gave the plaintiff 110*l.* damages; which being afterwards moved in court the *Michaelmas* term following, the Court unanimously agreed to the Ch. Justice's direction, and would not grant a new trial."]

An objection, however, is made to the defendant's title, because the ship was not registered at *Newcastle*, but de novo in *London*. But, upon reference to the acts of parliament, it will appear that there are six cases where a new register is to be made; 1st, by stat. 26 *Geo.* 3. *c.* 60. *s.* 22., where the certificate is lost or mislaid; 2d, by stat. 28 *Geo.* 3. *c.* 34. *s.* 14. and 34 *Geo.* 3. *c.* 68. *s.* 19., where it is wilfully detained by the master; 3d, by stat. 34 *Geo.* 3. *c.* 68. *s.* 21., where, after transfer of part of the property in some port, the former owners are desirous of having a new certificate; 4th, by stat. 26 *Geo.* 3. *c.* 60. *s.* 24., where a ship is altered in form or burthen; 5th, (which is the case in question), by stat. 7 & 8 *W.* 3. *c.* 22. *s.* 21., where the property is transferred to another port; 6th, by the same act, where the name of a ship is changed.* Now, here, the case states (*a*) that the defend-

(*a*) The residence of the defendant in *London*, which was omitted in the original state of the case, was, upon the argument, agreed to be inserted therein; and *Abbott* also stated the fact to be, that the ship, on her return from sea, went to *London* before the new certificate was obtained; and desired, if that fact should be thought material by the Court, and was not admitted by the other side, that the cause might go down to trial again to have that fact found.

ant

ant, at the time of regiſtering the ſhip de novo, was reſident in *London*, which made it the port of the ſhip: and, beſides, the Court will give credit to the proper officers in *London* that the ſhip was in a condition to be legally regiſtered there.

1803.

HEATH *against* HUBBARD.

Hall in reply obſerved, that the ſtat. 26 *Geo.* 3. *c.* 60. which gives the new oath, abrogates the old oath required by the ſtat. of *Car.* 2. and King *William*, and does not require the new oath to be taken upon a mere change of property in the ſame port, unleſs required by former part-owners; and the ſtat. 34 *Geo.* 3. *c.* 68. *ſ.* 15. and 16. only requires an indorſement on the certificate of regiſtry where the ſhip is in port, or certain documents and notices where it is at ſea at the time of the transfer. The defendant's argument is founded on a ſuppoſition that there can be no other than an *abſolute* aſſignment of a ſhip; whereas there may be a *conditional* aſſignment, in which caſe the oath muſt be taken conditionally. Beſides, the plaintiff having an abſolute conveyance of the whole property to him, and the whole legal intereſt in it, was authoriſed to take the oath in the form preſcribed, according to what was ſaid by *Buller* J. in *Rolleſton* v. *Hibbert* (*a*). So it was conſidered in a late caſe of *Rex* v. *Thelluſſon* at *Guildhall*, upon an indictment for perjury, that one who was mortgagee of the ſhip might take the oath as ſole owner. Beſides, if required, the plaintiff might have ſworn for whom he was truſtee. But ſuppoſing this to be a truſt which could not be ſupported, as againſt the general policy of the acts, at all events he muſt be conſidered as legal owner unfettered by the truſt. That in reſpect

(*a*) 3 *Term Rep.* 415, 416.

of

1803.

HEATH *against* HUBBARD.

of the defendant's title, before the ſhip could be transferred to another port an entry ought to have been made of the transfer in the port to which ſhe originally belonged, without which ſhe could not be legally regiſtered de novo, and conſequently the objection to the preſent action could not ariſe: though if the defendant's title were made out, he ſtill inſiſted on the diſtinction before endeavoured to be eſtabliſhed upon the denial of the plaintiff's title, and the ſale of the whole property by the defendant.

Lord ELLENBOROUGH C. J. at the cloſe of the argument intimated a ſtrong opinion, that ſuppoſing the parties to ſtand in the relation of tenants in common, the action could not be maintained upon the diſtinction that the acts of the defendant were equivalent to a deſtruction by him of the thing in common.

Cur. adv. vult.

Lord ELLENBOROUGH C. J. now delivered the judgments of the Court (after ſtating the caſe). At the trial three objections were taken on the part of the defendant: firſt, that the bill of ſale being in truſt for certain unnamed underwriters upon the ſhip, the ſame was void in point of law, as affording a means of covering foreign intereſts, and as tending to defeat the proviſions and policy of the ſtat. 26 *Geo.* 3. *c.* 60. and 34 *Geo.* 3. *c.* 68. directed to the aſcertainment of the true owners, and the prevention of any perſon from becoming ſuch except *Britiſh* ſubjects. Secondly, That the plaintiff's title was not perfected by ſuch entry being indorſed on the oath on which the original certificate of regiſtry was obtained, and by ſuch memorandum thereof made in the book of regiſtry, and notice thereof given to his Majeſty's commiſſioners of

 cuſtoms,

customs, as are required by the 16th sect. of the 34 *Geo.* 3. *c.* 68. Thirdly, That trover will not in this case lie; because, supposing the assignment to the defendant to be a valid one, the plaintiff and defendant would be tenants in common with each other of this ship, and between whom therefore, as such, an action of trover is not maintainable. The second of these objections was abandoned by Mr. *Abbott* on the argument, inasmuch as the 16th sect. of the 34 *Geo.* 3. *c.* 68. which relates to the alteration of property in ships when absent from their ports, construed by reference to the terms of the 15th, the immediately preceding section, and to which it immediately relates, can only be considered as *directory*, so far as it respects the entry and memorandum to be made, and the notice to be given to the commissioners of customs by the persons authorised to make registry: the vacating provisions being confined to the commission of such acts only as are required to be done by the immediate *parties to the sale or transfer*, and not extending (as it would be most unreasonable that they should extend) to the acts or omissions of third persons or strangers. For the third objection there is no foundation laid by any title on the part of the defendant under the register acts. The defendant claims under a register de novo in the port of *London*; contending that the ship being transferred to that port, a register de novo was properly granted in pursuance of the stat. 7 & 8 *W.* 3. *c.* 22. *s.* 21. It is not necessary on this occasion to consider what shall amount to a transfer of a ship to another port; for one who has no interest in a ship can have no power to make such a transfer; and we think that the defendant in this case had not any interest. The stat. 34 *Geo.* 3. *c.* 68. by its 15th section, reciting that by the laws now in force, upon any alteration of property in any

1803.

HEATH *against* HUBBARD.

1803.

HEATH *against* HUBBARD.

any ſhip or veſſel in the ſame port to which the ſhip or veſſel belongs, an indorſement upon the certificate of regiſtry is required to be made, directs the form of the indorſement upon it in ſuch caſes: and by the 16th ſect. provides, " that if any ſhip or veſſel ſhall be *at ſea, abſent* " *from the port to which ſhe belongs* at the time when *ſuch* " alteration in the property (i. e. any alteration) is made, " ſo that an indorſement on the certificate cannot be " made immediately, *a copy of the bill of ſale ſhall be deli-* " *vered, and an entry thereof ſhall be indorſed on the oath or* " *affidavit, and a memorandum made in the book of regiſters,*" otherwiſe that ſuch bill of ſale ſhall be utterly void to all intents and purpoſes. According to which proviſions, a copy of the bill of ſale to the defendant ſhould have been delivered to the proper officer at the port of *Newcaſtle*, in order that an entry thereof might be indorſed on the oath or affidavit, as the *Fiſhburn* was at ſea, or abſent from the port to which ſhe belonged, when *Ward* ſold her to the defendant; which not having been done, that ſale is void; and conſequently no regiſter de novo in the port of *London* could be made by the defendant, nor could any property veſt in him. As therefore the defendant was not a good tenant in common with the plaintiff from a defect in his own title, the objection to the action on the ground of a tenancy in common does not ariſe, and of courſe it becomes unneceſſary for us to decide whether the ſale of the whole ſhip by the defendant was, ſuppoſing him entitled to 3-4ths only, an act ſo far equivalent to a *deſtruction* of the ſhip as to entitle the plaintiff as a part-owner to maintain trover in ſuch caſe againſt the defendant as the other part-owner: a propoſition which it appears to us would have been extremely difficult on the part of the plaintiff to have ſuſtained, ſuppoſing the defendant to have had ſuch

1803.

HEATH against HUBBARD.

an intereft as would have raifed the queftion. The fecond and third objections on the part of the defendant being thus laid out of the cafe, the only remaining queftion is, Whether this truft bill of fale be void, and whether, if it be void at all, it be fo only as to the trufts in favour of the unnamed underwriters, or be abfolutely fo as to the truftee himfelf, as well as to the ceftui que trufts? And upon a full confideration of the cafe we are of opinion that, fuppofing it void, it is at moft void only as to the objects of the truft, and fo that the execution of the truft cannot be enforced by law; but that there is no fuch illegality affecting the truftee himfelf, as will prevent the property from vefting in him in the firft inftance. We are of opinion therefore that the plaintiff, whofe right to recover is not liable to be barred upon either of the other grounds of objection fecondly and thirdly made, and which, I have already confidered, is entitled to recover notwithftanding this objection.

Poftea to the Plaintiff.

1803.

Monday, June 27th.

ROBERTSON and THOMSON *against* FRENCH.

Where by a policy of insurance ship and goods were insured "at and from "all and every "port, &c. on "the coast of "*Brazil*, and "after the 17th "*September* to "*the Cape of* "*Good Hope*, "*beginning* the "adventure up-"on the goods "*from the load-*"*ing thereof a-*"*board the said* "*ship* at all or "every port, "&c. on the "coast of *Bra-*"*zil, and from* "the 17th *Sep-*"*tember* 1800; "and upon the "*ship in the same* "*manner*," with liberty to sail to, &c. any places backwards or forwards under the *Portuguese* Government, &c. at a premium of four guineas per cent. to return 3*l.* 10*s.* should the ship have arrived or the risk have otherwise ceased on or before the 17th of *September*: held that the policy only attached on the homeward-bound cargo, laden on board at the coast of *Brazil*, and did not cover a cargo originally taken in at *the Cape of Good Hope*, and which continued on board after the 17th of *September*, while the ship was on the coast of *Brazil*, and after she left it on her return to the *Cape*.' Neither did the policy cover the ship itself, which was insured *in the same manner* as the goods. Policies of insurance are to be construed by the same rules as other instruments, unless where, by the known usage of trade, or the like, certain words have acquired a peculiar sense distinct from their ordinary and popular sense. In an action on a policy, the property of the ship may be proved by parol evidence of the possession of the assured, unless disproved by the production of the written documents of the ship under the register acts. And held that such parol evidence of ownership, arising from possession at a particular period, was not disproved by shewing a prior register in the name of another and a subsequent register to the same person.

THIS was an action on a policy of insurance (*a*), effected by the plaintiffs as agents, "lost or not lost, at and from *all, any, or every port and place where and whatsoever on the coast of* Brazil, *and after the 17th day of* September, *to* the Cape of Good Hope, upon any kind of goods and merchandizes, and also upon the body, &c. of the ship *Chesterfield*, &c.; beginning the adventure upon the said goods and merchandizes from the loading thereof aboard the said ship, *at all, any, or every port and place where and whatsoever on the coast of* Brazil, *and from the 17th day of* September 1800, *and* upon the said ship, &c. *in the same manner*; and so shall continue and endure during her abode there upon the said ship, &c. and further until the said ship, &c. and goods, &c. shall be arrived at Simon's Bay *or* Table Bay, *both or either, with liberty to call at* St. Helena *or elsewhere*, upon the said ship, &c. and upon the goods, &c. until the same be there discharged, &c. And it shall be lawful for the said ship, &c. in this voyage to proceed and sail to and touch and stay at any ports or places whatsoever, *particularly backwards and forwards*,

(*a*) The words in italics were *written*, the rest of the policy set out was in the usual printed form.

and

1803.

ROBERTSON and Another *against* FRENCH.

and to and from those under the Portuguese *Government, or any port, place, island, or elsewhere on the coast of* South America, *without being deemed any deviation, and* without prejudice to this insurance. The said ship, &c. goods, &c. valued at 15,680 *l.*, *being upon goods, ship, and freight separately valued as under. And in case of capture, detention, or seizure, by any power whatever, to pay a total loss upon receiving documents of her being carried into port, and without inquiry into the regularity or irregularity of her pro-" ceedings; and with liberty to sell, barter, exchange, load, or unload the interest in part or whole at the island* St. Catharine, *or elsewhere, where and whatsoever.* Touching the adventures and perils, &c. [This part of the policy was in the common form.] At the rate of *four guineas per cent.*, *to return three pounds and ten shillings should the ship have arrived, or this risk otherwise have ceased, on or before the 17th of* September. In witness, &c." At the bottom of the policy, the goods were valued at 13,316 *l.*; ship at 1,550 *l.*; and freight at 814 *l.* The plaintiffs declared as agents of *Robertson* and *Walker*, upon a loss by the arrest and restraint of the King's ships. And at the trial (*a*) before Lord *Ellenborough* C. J. at the Sittings after last *Hilary* term, at *Guildhall*, it was admitted that the goods were of the value insured, *and had been put on board the ship* Chesterfield *at* the Cape of Good Hope. Much of the evidence turned upon the question, Whether the object of the voyage were to trade with the *Spanish* settlements in *South America*; *Spain* being then at war with

(*a*) Upon the first trial, the plaintiff was nonsuited on the opening of his counsel at *Guildhall*, it being stated that the goods were put on board at *the Cape of Good Hope*, and not on the coast of *Brazil*. The Court, for the purpose of having the whole case before them, awarded a new trial; and this was the second trial.

 this

1803.

ROBERTSON and Another *against* FRENCH.

this country? or, Whether it were only in contravention of the trading laws of *Portugal?* But nothing turned upon that point in the case as presented for the consideration of this Court. It is sufficient to state, that after the cargo had been taken in at the *Cape of Good Hope*, the ship went from thence, on the 7th of *February* 1800, to *Benguela*, on the coast of *Africa*, and afterwards to *St. Catharine's*, on the coast of *Brazil*, on the 30th of *May*; then to *Rio Janeiro* on the 27th of *July*; staid there upwards of two months, and remained on the coast till the latter end of *November*, when, on suspicion of illicit trading with the *Spanish* enemy, she was taken possession of by some of his Majesty's ships of war, and carried again to the *Cape*, with the original cargo on board, where she was libelled by the captors in the Vice-Admiralty Court there, on which the assured abandoned to the underwriters; and the ship, after being liberated by the sentence of the Court, was sold there, and has since arrived in *England*, about *October* 1802. On the part of the plaintiffs another policy, subscribed by this defendant, was offered in evidence, as being on the same subject-matter, between the same parties, and on the same continued risk; for the purpose of shewing that, in point of fact, the defendant had contracted with the present plaintiffs to insure the same subject from the 17th of *March* to the 17th of *September* 1800, being the period of the commencement of the present policy as to time. This was objected to on the part of the defendant, on the ground that the one policy could not be read in explanation of the other: and Lord *Ellenborough* only admitted it as evidence of the fact of such a policy having been effected. With respect to the plaintiffs' title to the ship, the evidence, upon which the objection was founded by the

4 defendant's

1803.

ROBERTSON and Another *against* FRENCH.

defendant's counſel, was that of Captain *Brooks*, the commander of the ſhip *Cheſterfield;* who proved that at the *Cape of Good Hope* he had ſold her to *Robertſon* and *Walker*, the two perſons in whom the intereſt is averred to be; that he, (*Brooks*,) and *Mortlock* the ſupercargo, had alſo ſhares in the ſhip, and that he was put in poſſeſſion by one *Lawrence Williams;* that the power which he (*Brooks*) had to diſpoſe of the ſhip was in writing; whereupon it was objected at the trial that no intereſt was ſhewn in the parties intereſted in the inſurance; for *Brooks* proved that they claimed by ſale from him, which muſt be in writing by the regiſter acts, and therefore the bill of ſale ſhould be produced. The defendant afterwards gave in evidence, for another purpoſe, the anſwer of the plaintiffs to a bill filed in Chancery; in which anſwer it appeared that *Lawrence Williams* was the owner of the ſhip when ſhe left *England*. And he alſo read in evidence the ſentence of the Vice-Admiralty Court at the *Cape of Good Hope*, (now under appeal before the Lords of the Privy Council,) by which the property in the ſhip was adjudged to be in the perſon claiming, to whom in the declaration it is averred to belong, and was directed to be reſtored to them; but that there was juſt cauſe of ſeizure at the time. It alſo appeared from the regiſter-book of the Cuſtom-houſe that up to *April* 1799, *L. Williams* was the regiſtered owner; and that in *Auguſt* 1802 there was a ſubſequent regiſter to the ſame perſon as ſole owner; and that the ſhip was ſold at the *Cape* under a decree of the Vice-Admiralty Court there. The plaintiffs recovered a verdict; and in the laſt term a rule niſi was obtained for ſetting aſide the verdict and entering a nonſuit, upon two objections; 1ſt, with reſpect to the intereſt of the aſſured; and, 2d, that nei-

1803.

ROBERTSON and Another *against* FRENCH.

ther the ship nor the goods on board were covered by the policy in question. The case was argued at very great length by *Erskine*, *Garrow*, *Park*, and *Giles*, for the plaintiffs; and by *Gibbs*, *Adam*, and *Marryatt* for the defendant. The greater part of the arguments having turned upon the critical and grammatical construction of the words of the policy, and the judgment of the Court touching upon the leading points, it is unnecessary to detail them here. The principal case adverted to, as illustrative of the meaning of the common printed words in a policy on goods "beginning the adventure upon the said goods, &c. *from* "*the loading thereof aboard the said ship*," at, &c., was *Hodgson* v. *Richardson* (a), which shewed, as the defendant's counsel insisted, that the policy only attached on goods actually put on board at the place named whereat the risk was to commence. On the other hand it was contended, that "from the loading thereof aboard," &c. meant from the fact of the goods being on board at such a place; and that in the case mentioned, the fact being clear that the goods had been put on board at *Leghorn* five months before, and not at *Genoa*, into which the ship had afterwards put after losing her convoy, and at which place the policy was to commence, if it had not been admitted on all sides that, primâ facie, at least goods so circumstanced might be covered by the general words of the policy, the plaintiff must have been immediately nonsuited; and it was fruitless to inquire into the question of fraudulent concealment from the underwriter of the time during which the cargo, which was of a perishable nature, had been on board, and upon which the judgment of the Court ultimately turned.

Cur. adv. vult.

(a) 1 *Bla.*, *Rep.* 463.

Lord

1803.

ROBERTSON and Another *against* FRENCH.

Lord ELLENBOROUGH C. J. now delivered the judgment of the Court. This rule was moved for on the part of the defendant on two grounds; firſt, that the plaintiffs had not given ſufficient proof that the intereſt in the ſhip was in *Robertſon* and *Walker*, in whom ſuch intereſt is by the declaration averred to be. Secondly, That the policy on this ſhip and cargo never attached; the adventure on the cargo being by the terms of the policy made to commence *from the loading* the goods aboard the ſhip *on the coaſt of* Brazil; an event which, as it was contended by the defendant, never happened, inaſmuch as the goods were not loaded *there*, but at *the Cape of Good Hope*. And it was alſo contended on the part of the defendant, that the adventure on the ſhip, being by the terms of the policy made to begin *in the ſame manner* with that on the goods, could of courſe have no commencement, if that on the goods never attached. [After ſtating the policy as before mentioned, his Lordſhip proceeded.]

In the courſe of the argument it ſeems to have been aſſumed that ſome peculiar rules of conſtruction apply to the terms of a policy of aſſurance which are not equally applicable to the terms of other inſtruments and in all other caſes: it is therefore proper to ſtate upon this head, that the ſame rule of conſtruction which applies to all other inſtruments applies equally to this inſtrument of a policy of inſurance, viz. that it is to be conſtrued according to its ſenſe and meaning, as collected in the firſt place from the terms uſed in it, which terms are themſelves to be underſtood in their plain, ordinary, and popular ſenſe, unleſs they have generally in reſpect to the ſubject matter, as by the known uſage of trade, or the like, acquired a peculiar ſenſe diſtinct from the popular ſenſe of the ſame

1803.

ROBERTSON and Another against FRENCH.

words; or unlefs the context evidently points out that they muft in the particular inftance, and in order to effectuate the immediate intention of the parties to that contract, be underftood in fome other fpecial and peculiar fenfe. The only difference between policies of affurance, and other inftruments in this refpect, is, that the greater part of the printed language of them, being invariable and uniform, has acquired from ufe and practice a known and definite meaning, and that the words fuperadded in writing (fubject indeed always to be governed in point of conftruction by the language and terms with which they are accompanied) are entitled neverthelefs, if there fhould be any reafonable doubt upon the fenfe and meaning of the whole, to have a greater effect attributed to them than to the printed words, inafmuch as the written words are the immediate language and terms felected by the parties themfelves for the expreffion of their meaning, and the printed words are a general formula adapted equally to their cafe and that of all other contracting parties upon fimilar occafions and fubjects.

As to the firft point made in this cafe on the part of the defendant, viz. that the ownerfhip alleged was not fufficiently proved: it was proved by the captain (*Brooks*) in the ordinary way, that the owners by whom, as fuch, he was appointed and employed, were the perfons in whom the ownerfhip is by the declaration averred to be. And though it afterwards appeared by his anfwers on crofs examination, that the ownerfhip was derived to thofe perfons under a bill of fale executed by himfelf as attorney to one *Lawrence Williams*, the former owner, it did not on that account become neceffary for the plaintiffs to produce that bill of fale, or the fhip's regifter, or to give any further proof of fuch their property; the mere fact of their

poffeffion

poſſeſſion as owners being ſufficient primâ facie evidence of ownerſhip, without the aid of any documentary proof or title deeds on the ſubject, until ſuch further evidence ſhould be rendered neceſſary in ſupport of the primâ facie caſe of ownerſhip which they made, in conſequence of the adduction of ſome contrary proof on the other ſide. No ſuch contrary proof was however in this caſe given on the part of the defendant. For the prior regiſter in the name of *Lawrence Williams* as owner in 1799, and a ſubſequent regiſter to the ſame perſon upon a ſale at the *Cape* in 1802, under a decree of the Court of Vice-Admiralty, and which were given in evidence by the defendant, were perfectly conſiſtent with a title in other perſons *in the mean time*, agreeable to the averment in the declaration.

As to the ſecond point made in this caſe, viz. that the policy on the ſhip and goods never attached: it is aſſerted on the part of the defendant, that the adventure in queſtion as to its commencement, according to the natural and obvious meaning of the language and terms of the policy, depends upon and is limited by the co-exiſtence and concurrence of three ſeveral circumſtances, viz. one of *place*, one of *time*, and one of *event or fact*. And firſt of place, that it is to attach *on the coaſt of* Brazil: ſecondly of time, that it ſhould attach *there after the 17th of* September: and thirdly of event, that *the goods ſhould have been then loaden at ſome port or place on the coaſt of* Brazil. The adventure upon the ſhip is in terms declared to begin "*in the ſame manner*," i. e. at the time, and place, and after the happening of the events before deſcribed and ſpecified in reſpect to the cargo. But it is argued on the part of the plaintiffs, that the latter circumſtance of event, or fact, as I have termed it, does not affect the commencement of this adventure; and that the words, "*from the loading thereof*

aboard

1803.

ROBERTSON and Another *against* FRENCH.

" *aboard the said ship*," are either to be rejected wholly; in which case the policy will stand thus, " beginning the " adventure upon the said goods and merchandizes at all, " any, or every port and place where and whatsoever on " the coast of *Brazil*," without regard to the place at which such goods may have been in fact *antecedently laden*; or that the words, " from the loading thereof aboard the " said ship at," are to be understood from the time of the ship's *being with the goods loaden on board her*, or *having such her cargo on board her*, *at* the place mentioned in the policy, i. e. in this case, at the coast of *Brazil*. The objection to the first of these constructions (besides the difficulty of wholly rejecting words having an apparently significant meaning, and referring distinctly to an act to be done at a given place) is stated to be this, that if the cargo insured be understood to be generally a cargo *at*, or a cargo *on board on* the coast, and not one actually and originally *taken in upon* the coast, the policy would in that case cover the risk on two successive cargoes, i. e. on the outward cargo with which the ship should be in a loaded state on the coast after the 17th of *September*, and the homeward or that which it should take in there; and that it would not be just towards the underwriter so to construe the words, as to cover thereby at his risk two successive cargoes, when one original cargo only, according to all the ordinary usages of trade and practice of insurance as applied to such form of words must be understood to be meant, in addition to the liberty of sale, barter, and exchange given by a subsequent part of the policy: and further to reject emphatical words, in order to accomplish a construction so much to the apparent disadvantage of the underwriter. And indeed if only one original cargo were meant to be covered, a *Brazil* cargo appears

1803.

ROBERTSON and Another *against* FRENCH.

to have the beſt claim to be conſidered as that one. For it would be prepoſterous to conſider the policy as meant, in preference to any other one cargo, to cover a cargo taken in at *the Cape of Good Hope*, and which ſhould remain unprotected, as far as this policy is concerned, wherever it ſhould be, till the 17th of *September*, and from that day, if it were then on the coaſt of *Brazil*, ſhould be protected there, and during the courſe of its barter, ſale, and exchange at the iſland of *St. Catharine* and elſewhere, and during its re-conveyance afterwards back to the *Cape* from which it had originally proceeded. The ſame objection in a great meaſure applies to the ſecond conſtruction, which without wholly rejecting the words "*from* "*the loading thereof aboard the ſhip*," conſiders the goods as the ſubject of inſurance *when, after the 17th of* September, they ſhould be *in a loaded ſtate at the coaſt of* Brazil: for this conſtruction would equally exclude the poſſibility of covering by this policy an homeward cargo taken in at the coaſt of *Brazil* to be carried to the *Cape*, provided the ſhip ſhould have arrived on the coaſt of *Brazil* with an original cargo on board; unleſs indeed two ſucceſſive cargoes could be covered by a policy conceived in theſe terms. But the moſt natural conſtruction of the words, if the immediate letter of them were leſs directly applicable to a cargo *taken in* on the coaſt, ſeems to be to make them apply to a cargo to be carried to the terminus ad quem, upon and within the immediate limits of the voyage deſcribed in the policy, rather than to a cargo conveyed, as it ſhould ſeem, in a courſe of uſeleſs circuity from the place from which the ſhip originally proceeded before the voyage in queſtion had commenced; continuing, except inaſmuch as it might be altered by barter, ſale, and exchange, on board during the voyage, and to be delivered

at

1803.

ROBERTSON and Another against FRENCH.

at the place at which the voyage is at laſt appointed to terminate. But the queſtion naturally occurs, Is there any thing to be found in the policy which aſſigns to theſe words a ſenſe, thus apparently different from the ordinary grammatical ſenſe of them? And looking as we are obliged to do to the policy, and to the policy alone, in order to collect the intention of the parties as to the commencement and duration of the adventure thereby protected, we cannot feel ourſelves at liberty to disjoin in point of effect and conſtruction the words, "*at all or any* "*port or place on the coaſt of* Brazil," from the words, "*from the loading thereof aboard the ſaid ſhip,*" by which they are immediately preceded, and with which by immediate context they appear to us to be neceſſarily united. If the ſame words had not been thus incorporated with the body of the text of the printed words, and made to form therewith one entire and continued chain of words, and one unbroken ſentence of intelligible expreſſions all applicable to the ſame ſubject-matter, it might perhaps have been open to us to have given them a different meaning, and to have conſidered them as words written in the margin of the policy, (and applying, therefore, indefinitely to the whole of the policy, and not to any particular part of it,) are uſually conſidered; that is, as controlling the ſenſe of ſuch parts of the printed policy to which, in ſound conſtruction and by reaſonable reference, they may appear to apply. As, for inſtance, where the word *ſhip* is written in the margin of the policy, or *freight*, or *goods*: in ſuch caſe the general terms of the policy, applicable to other ſubjects beſides the particular one mentioned in the margin, are thereby conſidered as narrowed in point of conſtruction to that one. And this is done in caſes where the ſubject meant to be inſured is ſtill more remote from

"ſhip

"ſhip and goods," the only ſubjects of inſurance in the printed policy; viz. where the object of the inſurance, as declared by the marginal memorandum, is, money lent on *bottomree* or *reſpondentia*, or the like: the meaning of which marginal memorandum may be tranſlated thus:—We mean to inſure the ſubject ſo named, "*freight*" for inſtance, ariſing and accruing during the limits of the voyage within deſcribed, from the carriage of goods on board the ſhip within mentioned, againſt the perils within enumerated, and upon the premium herein ſpecified. In other words, we adopt the general language of the policy, as far as it may ſerve to effectuate this object, and no further. Had, indeed, the ſubject-matter of the inſurance itſelf, or the character, ſituation, and deſcription of the perſons making it, or any other circumſtance attending the inſurance pointed out and required a narrower rule of conſtruction, the ordinary effect of theſe words might perhaps have been in ſuch caſe controlled: but can any ſuch reſtrictive rule of conſtruction be applied to the words "*at all*, &c. *ports and places on the coaſt* "*of* Brazil," as they occur here, without ſhaking the fundamental rules of conſtruction as applicable to all deeds and inſtruments whatſoever? Feeling, therefore, the impoſſibility of aſſigning to theſe words any other place in or with reference to this contract than what the parties themſelves have done; and feeling the impoſſibility of aſſigning to them in that place, and with the context which attends them, any other meaning than what they obviouſly and in their plain grammatical ſenſe import, we are obliged to ſay that the adventure could only attach on goods and ſhip after a loading of goods had taken place on the coaſt of *Brazil*: and as that circumſtance or event never took place in the preſent inſtance, that the policy

of

1803.

ROBERTSON and Another *against* FRENCH.

1803.

ROBERTSON and Another *against* FRENCH.

of course never attached at all. It certainly was in the contemplation of the parties that the risk meant to be insured might have ceased before the 17th of *September* 1800, and a return of premium is provided in that event: but I do not think that the construction of the rest of the policy is so materially affected by this stipulation as to require any particular observations upon it. Upon the whole, we are of opinion that this rule, which calls on the plaintiff to shew cause why the verdict should not be set aside and a nonsuit entered, must be made absolute.

Rule absolute.

Monday, June 27th.

The KING *against* The Justices of DENBYSHIRE.

If the magistrates, upon proper lists returned to them, omit to appoint a surveyor of the highways at their first special sessions after the *Michaelmas* quarter sessions, as *directed* by the stat 13 *Geo.* 3. *c.* 78. *s.* 1., they are bound to make such appointment at a subsequent special sessions.

A Rule called on the justices of peace within the limit of the county of *Denbigh*, where the township of *Esclusham below* in the parish of *Wrexham* lies, to shew cause why a writ of mandamus should not issue to them, commanding them to appoint a surveyor of the highways for the said township for the residue of the present year. The affidavit upon which the rule was obtained stated, that from time immemorial a surveyor of the highways had been separately appointed for the said township distinct from the parish of *Wrexham*. That the former surveyor was only appointed for the year ending at *Michaelmas* last: and that pursuant to the stat. 13 *Geo.* 3. *c.* 78. the inhabitants met on the 22d of *September* for the purpose of making out lists of proper persons to serve the office, and more than two parts out of three of those assembled agreed on *W. W.*, one of the list, as a proper person to serve for the ensuing year, whose name together with

with the ſaid liſt was duly returned and delivered to the juſtices at their following ſpecial ſeſſions holden in the week next after the laſt *Michaelmas* general quarter ſeſſions: but that the juſtices, by reaſon of ſome diſpute reſpecting the account of the former ſurveyor, made no new appointment; and that no appointment had been made ſince, and the roads were getting into decay. 1803.

The KING *againſt* The Juſtices of DENBYSHIRE.

Wynne, in ſhewing cauſe, ſaid on the part of the magiſtrates, that their only reaſon for not having made an appointment at a ſubſequent meeting was a doubt conceived by them that the firſt clauſe of the ſtatute only enabled ſuch appointment to be made at the firſt ſpecial ſeſſions after the *Michaelmas* quarter ſeſſions, where proper liſts had been returned, which was not queſtioned in this caſe; the concluding part of the ſection, which enabled the juſtices to appoint a ſurveyor at a ſubſequent ſpecial ſeſſions, being confined to the two caſes, firſt, where *no liſt* had been made and returned, and next, where the perſon appointed ſhould refuſe to ſerve the office. But after the deciſion in *Rex* v. *Sparrow and others* (*a*) upon a ſimilar proviſion in the ſtat. 43 *Eliz. c.* 2. *ſ.* 1. for the appointment of overſeers, he ſaid that he could not maintain that ſuch doubt was well founded: but he rather preſumed that the Court would conſider the proviſion as to time *directory* only to the magiſtrates; particularly upon conſidering the 5th ſection.

Manley, in ſupport of the rule, referred to the caſe before cited, which he read. And by

(*a*) 2 *Stra.* 1123. and 1 *Conſt's Bott.* 17, edit. 1793.

Lord

1803.

The King *against* The Justices of Denbyshire.

Lord Ellenborough C. J. This part of the act is only directory to the magistrates to make the appointment at the time mentioned: but there are no negative words to prevent them from exercising their office in that respect at any subsequent time, if it shall be necessary. And common sense requires that if the appointment be not made at the first special sessions it should be made afterwards.

Per Curiam, Rule absolute.

Tuesday, June 28th.

Heskath *against* Blanchard and Another, Executors of Robertson.

A., having neither money nor credit, offers to *B.* that if he will order with him certain goods to be shipped upon an adventure, *if any profit should arise from them*, B. *should have half for his trouble*; *B.* having lent his credit on this contract, and ordered the goods on their joint account, which were furnished accordingly, and afterwards paid for by *B.* alone: held that he was entitled to recover back such payment in assumpsit against *A.*, who had not accounted to him for the profits; such contract not constituting a partnership as between themselves, but only an agreement for a compensation for trouble and credit; though *B.* were liable as a partner to third persons, creditors.

THIS was an action for goods sold and delivered, and on the common money counts. The defendant pleaded the general issue, and paid 50 *l.* into court upon the count for goods sold and delivered, which was laid out of the question in the ultimate consideration of the case. With respect to the count for money paid, laid out, and expended by the plaintiff for the use of the testator, the case appeared to be this. The plaintiff was a draper and tailor, with whom the testator, who had been a captain of a vessel in the *African* trade, had had dealings for several years. In the spring of 1800 the plaintiff applied to *Robertson*, who was then about to sail for the coast of *Africa*, for orders; who declined giving him any, saying he knew of something else, which would answer better; but *as he had no sufficient credit for himself, nor ready money*, he requested the plaintiff to go with him to one *Corse*, a butcher, and order certain quantities of beef and

1803.

HESKETH *against* BLANCHARD.

tripe to take with him on the voyage, promifing *that if any profit fhould arife from them the plaintiff fhould have one half for his trouble. Corfe* accordingly furnifhed the articles, to the value of 75 *l.*, and fent them on board *Robertfon's* fhip *by the defire of the plaintiff and* Robertfon, *both of whom* he made *debtors* for the goods; and being examined as a witnefs at the trial, he alfo fwore that he would not have trufted *Robertfon* alone. After the goods were fhipped, *Robertfon* defired the plaintiff to make an infurance. The plaintiff afterwards paid *Corfe* the whole fum; and *Robertfon* being fince dead, without having come to any fettlement with the plaintiff, he brought this action to recover the money fo paid. At the trial before *Rooke* J. at the laft *Lancafter* affizes, it was objected by the defendant's counfel, that as the parties were to divide the profits, if any, they muft neceffarily be equally liable to any lofs, and therefore the agreement conftituting a partnerfhip, the action was not maintainable by one partner againft the other. To this it was anfwered, on the part of the plaintiff, that it was not a connection of profit and lofs, but a fimple payment of money for the ufe of another, upon an undertaking by that other to pay him half the profit of a certain adventure, fuppofing it to be fuccefsful; and that though the plaintiff had made himfelf refponfible to *Corfe* for the value of the articles furnifhed upon his credit jointly with that of *Robertfon*, yet as between themfelves, or in any other refpect, there was no partnerfhip. It was thereupon agreed to take the opinion of this Court upon the point; and the jury were accordingly directed to find a verdict for the plaintiff for 75 *l.*, fubject to the opinion of this Court, Whether the plaintiff were entitled to recover the whole or a moiety? and if the Court fhould be of

1803. HESKETH against BLANCHARD.

opinion that he was not entitled to recover any thing, a nonfuit was to be entered.

Park and *Wood*, who were to have fhewn caufe againft a rule for entering a nonfuit, after ftating the facts of the cafe, and making the diftinction above noticed, were ftopped by the Court.

Topping and *J. Clarke*, contrà, faid that there might be a partnerfhip in a particular tranfaction or adventure as well as in a general trade, and this was of the former kind. That in *Grace* v. *Smith* (*a*), the tranfaction between *Smith* and one *Robinfon*, who had individually contracted the debt for which the action was brought, was holden not to be a partnerfhip, becaufe the fhare which *Smith* was to receive was not payable *out of the profits of the trade*, but was a perfonal demand on *Robinfon*: whereas here the agreement was in terms for the plaintiff to have one half *of the profit* of the adventure. And this principle was not controverted by Lord C. J. *Eyre* in *Waugh* v. *Carver* (*b*), though the diftinction was taken with refpect to agreements which would conftitute a partnerfhip with refpect to creditors, though not as between the parties themfelves. But there the parties had exprefsly ftipulated between themfelves not to be anfwerable for each other's loffes, which fhewed that their intention was not to become partners. Here there was no fuch ftipulation, and therefore no fuch intention can be inferred: and then, by the general operation of law upon their agreement, they were conftituted partners.

(*a*) 2 *Blac* 998.
(*b*) 2 *H. Blac.* 235. and vide *Mofs* v. *Wilfon*, 4 *Term Rep.* 353.

Lord

1803.

HESKETH *against* BLANCHARD.

Lord ELLENBOROUGH C. J. The diſtinction taken in *Waugh* v. *Carter and others* applies to this caſe. Quoad third perſons it was a partnerſhip; for the plaintiff was to ſhare half the profits. But as between themſelves it was only an agreement for ſo much, as a compenſation for the plaintiff's trouble, and for lending *Robertſon* his credit.

Per Curiam, Rule diſcharged generally.

MUSSEN *againſt* PRICE and Another.

Tueſday, June 28th.

Where goods were ſold upon a contract that the vendee was to pay for them *in three months by a bill of two months*: held that the contract was for a credit of *five* months, and therefore that aſſumpſit for goods ſold and delivered could not be brought at the end of *three* months upon the neglect of the vendee to give his bill at two months; the remedy being by a ſpecial action on the caſe for damages for the breach of contract in not giving ſuch bill.

THIS was an action for goods ſold and delivered, tried before *Rooke* J. at the laſt *Lancaſter* aſſizes; and the only queſtion was, Whether the action were commenced before the time of credit on which the goods had been contracted to be bought was expired? The goods in queſtion were a quantity of cotton, valued at 217 *l.*, for which *payment* was to be made by the defendants *in three months after the* 15*th of* September 1802, (the day on which the bargain was concluded,) *by a bill of two months.* The action being commenced in *Hilary* term laſt, before the expiration of five months from the 15th of *September* preceding, the defendant's counſel objected that it was prematurely brought, and therefore that the plaintiff ſhould be nonſuited: but the learned Judge held, that unleſs the defendants could ſhew (which they did not do) that they had given or tendered ſuch a bill at the end of the three months, the action would lie for goods ſold and delivered. Accordingly the plaintiff recovered, but the point was ſaved for the conſideration of the Court. And in the laſt term *Raine* obtained a rule niſi for ſetting aſide the verdict and entering a nonſuit, principally upon

1803. — Mussen *against* Price.

the authority of a case of *Millar* v. *Shaw*, at *Lancaster Lent* assizes 1801, before *Chambre* J., where the plaintiff was nonsuited on a similar objection.

Cockell Serjt. *Holroyd*, and *Yates*, now shewed cause against the rule. The contract was in substance for the sale of the goods upon an absolute credit of three months only, with an indulgence to the defendant to give a bill at two months instead of ready money, provided he was enabled to get a good acceptance, and was desirous so to do. Then the defendant having broken the condition, the action lies at the end of the three months for which the credit was given. It is plain that the plaintiff would not trust the defendant himself longer than the three months: payment was then to be made in some shape or other: a bill at two months was one mode of payment; but still, if good, it was to be taken as cash, which such bills are considered to be in that part of the country. [*Grose* and *Lawrence*, Justices, having suggested whether this were not rather to be considered as a special contract for the sale of goods upon an undertaking by the defendant at the end of three months to give a bill at two months, for the breach of which the plaintiff had his remedy in damages;] they contended that the plaintiff was not bound to declare upon the special contract, but, upon the condition broken, might recur to the common remedy of indebitatus assumpsit for goods sold and delivered, the consideration having failed on which he had agreed to suspend his claim; as in *Puckford* v. *Maxwell* (*a*), and *Owenson* v. *Morse* (*b*). Supposing the defendant had given his bill, which was dishonoured when tendered for acceptance, the plaintiff might have sued the defendant as

(*a*) 6 *Term Rep.* 52. (*b*) 7 *Term Rep.* 64.

drawer

1803.

MUSSEN *against* PRICE.

drawer immediately, without waiting for the expiration of the time which the bill had to run (*a*). Then the plaintiff cannot be in a worse condition by the defendant's not having given him any bill.

Topping, and *J. Clarke*, contrà, relied upon the case of *Miller* v. *Shawe* (*b*), at *Lancaster Lent* assizes 1801, before *Chambre* J., of which they read the following note taken by a gentleman at the bar. "Action for goods sold and delivered. The plaintiff's evidence proved that the goods were sold *at two months and two months*, that is, to be paid for at two months by a bill at two months; which the witness considered as cash at four months. The action was brought before the expiration of the four months; and the declaration was in the usual form, containing the usual counts of indebitatus assumpsit and quantum valebant for the amount. *Topping* for the defendant contended, that no debt existed at the commencement of the action, nor till the four months were expired; but that the plaintiff might have brought his action after the expiration of the two months, and before the end of the four months, upon a breach of his contract for the non-delivery to him of a bill; but that no action of indebitatus assumpsit would lie till the end of the four months. *Cockell* Serjt. and *Yates* contended, that as the defendant had not given the bill at the end of the two months, they might abandon the contract, and recover the price of the goods for want of the bill, which if given the plaintiff was to accept in lieu

(*a*) Vide *Milford* v. *Mayor*, *Dougl.* 54. and *Ballingalls* v. *Gloster*, 3 *East*, 481.

(*b*) It was at first supposed by the plaintiff's counsel that the action in this case was not brought till after the expiration of the four months' credit, and that therefore the opinion of the learned Judge was extrajudicial; but upon inquiry the note here given was found to be correct.

 of

1803.

MUSSEN *against* PRICE.

of the money.—And *Chambre* J. at firſt ſeemed to be of that opinion; but on hearing *Topping* for the defendant, as above, he thought that after the four months the plaintiff need not have declared on the contract, but the money being then due and unpaid, he might declare in the uſual way, and recover the price as a debt on an indebitatus aſſumpſit. Before that time, however, he thought the plaintiff's only remedy was for breach of the promiſe in not delivering the bill at two months. Plaintiff nonſuited.—*Cockell* Serjt. then ſaid, that *Chambre* J. had ruled the ſame in another cauſe at a former aſſizes at *York*." They then obſerved, in anſwer to the caſe of the drawer, againſt whom an action lies immediately upon the diſhonour of his bill, that generally there is no contract for time in ſuch caſes, but an antecedent debt from the drawer, and an indulgence voluntarily granted by the payee. Then upon failure of the conſideration the party is referred back to his original action. But ſuppoſe 100*l.* originally lent upon the terms of payment by certain inſtalments: there, though the firſt inſtalment were not paid at the time, ſuch failure would not give an immediate action for the whole.

Lord ELLENBOROUGH C. J. The only queſtion here is as to the form of declaring. There is no doubt but that the plaintiff might have recovered by bringing his action on the ſpecial contract, and laying the breach for the non-delivery of a bill at the end of the three months. But the queſtion is, whether he has not alſo this remedy. And if it were not for the authority of the caſe cited before Mr. Juſtice *Chambre*, whoſe opinion is entitled to great weight, I ſhould have thought that this was an abſolute agreement for a credit of three months, with a ſti-

pulation

1803.

MUSSEN *against* PRICE.

pulation on behalf of the defendant, that at the end of the three months he ſhould be at liberty to give the plaintiff a bill at two months for payment, which was to be taken as ſuch if the condition were performed: and ſuch it is always conſidered in that part of the country. But ſtill the bargain between the parties was for a credit of three months. That was the leaning of my mind before I heard of the deciſion of the learned Judge which has been relied on: and ſo, I muſt own, it is in ſome degree ſtill. And I think the plaintiff's argument was well illuſtrated by the caſe put of a man taking in payment for goods a bill drawn by the vendee on another, payable at a future time. There if the bill be diſhonoured, it is in common experience that the payee may bring his action immediately; and yet, taking the whole tranſaction together, it might as well be ſaid in that caſe, that there was a credit given for ſo many months as the bill had to run; and that before that period the only remedy of the party was a ſpecial action on the caſe for the damage, by reaſon of the diſhonouring of the bill. But no ſuch action has ever been brought, though the occaſion muſt have often occurred. Whatever reſpect therefore I feel for the opinion which has been cited, the preſent feeling of my mind is that this action is well brought.

GROSE J. This action is not brought upon an expreſs aſſumpſit between the parties, but upon an aſſumpſit implied in law. Then how does the caſe ſtand? Two perſons agree on what terms the one will buy and the other ſell certain goods. The ſeller offers them at a certain price; but the buyer ſays that he cannot pay for them at once, but that at the end of three months he will give his bill payable at two months. The ſeller aſſents to this offer,

1803.

MUSSEN *against* PRICE.

because at the end of three months' time he expects to have a bill which he can negotiate, and thereby raise money. This then is no implied contract whereon to raise an implied assumpsit, but an express contract including the terms on which the one agreed to buy and the other to sell, for the non-performance of which the party has his remedy in damages. The action then ought to have been brought for the not giving the bill, which the defendant had undertaken to do, and not for goods sold and delivered, in which case the promise is to be implied from the circumstances of the case. But this is not the case of an implied but of an express promise.

LAWRENCE J. I am of the same opinion. The proper ground of action is the non-performance by the defendant of his agreement with the plaintiff. That agreement was that the defendant should pay for the cotton in a particular way, namely, that at the expiration of three months he should give the plaintiff his bill payable at two months. Then how was the contract broken? By not giving at the end of three months his bill at two months: for which breach of contract the remedy lies in damages. That therefore was the mode in which the action should have been brought: in which action the plaintiff would have recovered damages against the defendant for his not having given the bill, such as the loss of interest, &c. and the action should not have been on a promise to pay the value of the goods before the expiration of the credit. The argument for the plaintiff goes upon an assumption that the giving of the bill was a *condition* upon which the credit was to be extended beyond the three months. But I see no *condition* in the contract. If it had been, that *if* at the end of three months the defendant could give a bill

at

1803.

MUSSEN *against* PRICE.

at two months the plaintiff ſhould take that in payment, there might have been ſome foundation for the argument: but there are no words of condition. The giving of the bill at two months was a term introduced into the contract for the benefit of the ſeller, that at the end of three months he might have in his hands an inſtrument which he could negotiate. If the credit had been given generally for the whole five months, he would have been out of caſh all the time: but he was to give the defendant the benefit of five months' credit, while he had only the diſadvantage of giving it for three months. As to the caſe put of a bill payable at a future day given for payment, upon which, if diſhonoured, the drawer may be immediately ſued, I think a good anſwer was given to it at the bar. If there were no agreement for time, the party takes it as payment: and therefore if it turn out to be good for nothing, the creditor has not received that which the other undertook to give him, and may therefore purſue his remedy immediately.

LE BLANC J. I think this action was brought before the time for which I conſider that credit was given to the defendant. Here is an expreſs promiſe proved between the parties. The ſeller was to ſtand upon the credit of the defendant alone for three months, and then he was to have in addition a third perſon's credit for two months longer; ſo that altogether the defendant was to have credit for five months before he was called upon to pay. But he will not have the benefit of his contract if he be called upon for the full ſum before the expiration of the five months' credit. The caſes alluded to, and which have only occurred at niſi prius, have been where goods have been ſold, and a bill taken in payment payable at a future

day,

1803.

MUSTON *against* PRICE.

day, but without any exprefs contract for time for the payment of the goods; and thereupon the bill being difhonoured, the drawer has been fued immediately. But I fhould think even in thofe cafes, if the jury found that the agreement really was for time, that the fame objection might be made to the action as in this cafe. In general however the goods are confidered as fold for a ready money price, only the feller takes a bill as ready money payment. In this view of the cafe I think the prefent action is not maintainable; and that the plaintiff fhould have been nonfuited. And in all cafes, without exprefs authority to the contrary, it is better to keep the forms of action as diftinct as poffible, inftead of running one into another.

Rule abfolute.

Tuesday, June 28th.

LEGH *againft* HEWITT.

In an action againft a tenant upon promifes that he would occupy the farm *in a good and hufbandlike manner according to the cuftom of the country*, an allegation that he had treated the eftate contrary to *good hufbandry and the cuftom of the country*, is proved by fhewing that he had treated it contrary to the *prevalent courfe of good hufbandry in that neighbourhood*, as by tilling *half* his farm at once, when no other farmer there tilled more than a *third*; though many tilled only a *fourth*. And it is not fufficient to fhew any precife definite cuftom or ufage in refpect to the quantity tilled.

THE plaintiff declared in affumpfit, for that whereas on the 2d of *February* 1801 the defendant was tenant to him of a certain farm at *Lymm* and *High Legh* in the county of *Chefter*, containing 55 *Chefhire* acres, in confideration thereof he promifed that during his tenancy of the premifes he would ufe and occupy the fame *in a good and hufbandlike manner, according to the cuftom of the country where the faid premifes lie:* and then affigned breaches, 1ft, that during fuch tenancy the defendant wrongfully, &c. *and contrary to good hufbandry and the cuftom of the faid country* ploughed up and converted into tillage divers, to wit, five *Chefhire* acres of grafs land, parcel of the faid

premifes,

premiſes, which according to good huſbandry and the cuſtom of the ſaid country ought not to have been ploughed up, &c.; and the defendant afterwards took divers and exceſſive crops of grain therefrom. 2d, That whereas according to good huſbandry and the cuſtom of the country the defendant as tenant ought not to have had at any one time more than a certain part, to wit, one-third of the ſaid premiſes in tillage, yet he wrongfully, &c. kept in tillage a larger part, to wit, one-half at the ſame time, contrary to good huſbandry and the cuſtom of the country, and took exceſſive crops of grain therefrom. A 3d breach was for having more at one time than a third part of the arable part of the premiſes ſown with wheat, contrary to good huſbandry and the cuſtom of the country: by reaſon of which miſconduct and breaches of contract the eſtate was impoveriſhed, &c. to the plaintiff's damage of 500*l*. The promiſes were laid in the ſame manner in the ſecond count, and the breaches alleged generally. The third count laid the promiſes to be, that the defendant would uſe and occupy the premiſes in a tenantlike manner, and would not, during his tenancy, or in the year when the ſame ſhould determine, take from the premiſes any greater crops of corn than *by the cuſtom of the ſaid country* ſhould and ought to be by him taken. There were alſo the common money counts added. Plea, Non aſſumpſit. At the trial at the laſt *Cheſter* aſſizes, before the Chief Juſtice, the plaintiff's counſel put his caſe on the implied aſſumpſit, founded on the courſe of good huſbandry as known and practiſed in that part of the country; and many witneſſes were called, who eſtabliſhed that by the practice of good huſbandmen in the neighbourhood not more than one-third of a farm, in a cold ſoil like this, was ever kept in tillage at the ſame time; and in moſt other

1803.

LEGH *againſt* HEWITT.

1803.

LEGH *against* HEWITT.

other instances, where the soil was warm, not above a fourth; and that not more than one-third of what was in tillage ought to be laid down in wheat. Whereas the defendant, who had quitted the farm in *May* 1802, was proved in 1801 to have had half of it (viz. something more than 27 acres) in tillage in that year, of which 11 acres were sown with wheat. It appeared, however, that this practice was governed by covenants in the leases of the respective tenants whose mode of cultivation was spoken of; and the witnesses could not speak to any *custom* of the country independent of the obligation of covenants: but they all agreed that a practice like that of the defendant was contrary to the course of good husbandry, and exceedingly prejudicial to an estate; and that in fact the plaintiff's farm had been materially deteriorated under the defendant's management. It was further proved that the defendant, in a conversation with the incoming tenant, had admitted that he should not have ploughed up the grass field mentioned in the first count if he had staid in the farm, without marling it, which would have cost him 50*l.* But there was no evidence applicable to the third count, to shew that the defendant had taken off a greater proportion of the corn that was sown than he was entitled to as an offgoing tenant. After the plaintiff's evidence was closed, it was objected by the defendant's counsel, that the plaintiff ought to be nonsuited, as there was no evidence of any such *custom* of the country as was alleged in the declaration; but the Court was of opinion that the evidence, though slight, ought to go to the jury. When the plaintiff's counsel contended that it was not necessary for him to prove any *custom*, but that it was sufficient for him to shew that the defendant had not managed his farm in a husbandlike manner. The

Court,

1803.

LEGH *against* HEWITT.

Court, however, thought that, as the declaration was framed, the plaintiff had founded his action upon what he called *the cuſtom of the country*, and that it was neceſſary for him to prove it. The jury, hearing this opinion delivered, after the defendant's counſel had urged to them that there was no evidence of ſuch a cuſtom, being ſatiſfied on that head, found a verdict for the defendant, without waiting to have the evidence ſummed up, or receiving the direction of the Court in point of law upon the effect of it. And therefore the Chief Juſtice, in his report of the trial to this Court, (upon a rule niſi obtained for ſetting aſide the verdict and having a new trial,) conſidering that the jury were influenced by the opinion which had been thrown out by the Court in the courſe of the trial, in anſwer to what was contended for by the plaintiff's counſel, concluded with ſtating that, *if it were not neceſſary for the plaintiff to prove any cuſtom*, he thought there ought to be a new trial.

Manley and *Wigley* ſhewed cauſe againſt the rule. The allegation that the defendant undertook to manage the farm *according to the cuſtom of the country*, which is in the two firſt counts, to which only the evidence of miſmanagement applied, is a material allegation, and eſſentially different from a ſimple allegation that the farm was managed contrary to good huſbandry: for upon ſuch a declaration, if an eſtabliſhed courſe of huſbandry in that part of the country had been proved from which the defendant had departed, it would have been no defence for him to have ſhewn that he had conducted the farm upon good principles of huſbandry uſed and approved in other places. The cuſtom as laid is part of the ſpecific contract, for

1803.

LEGH *against* HEWITT.

the breach of which the action is brought, and was therefore neceſſary to be proved. And in *Powley* v. *Walker* (*a*), which was the firſt caſe of this kind reported, it is even ſaid that the law will infer ſuch a promiſe from the bare relation of landlord and tenant: much more therefore is it material where it is expreſsly ſtipulated in the terms of the letting. Here the jury were ſatisfied that there was no ſuch cuſtom, and conſequently there could be no breach of it.

Gibbs, *Topping*, and *J. Clarke* contrà. It was not neceſſary in this form of declaring to prove that any known certain cuſtom or courſe of huſbandry exiſted in that part of the country: in ſtrictneſs there could be no legal *cuſtom* as applicable to ſuch a ſubject: but taking the allegation in its popular and lax ſenſe, and according to the general underſtanding of mankind on the ſubject, it was ſufficient to prove that the defendant's treatment of the farm was againſt the known good rules and prevalent courſe of huſbandry as generally practiſed in that country, with all its modifications and variations. It was enough to ſhew, that though ſome farmers might put a *fourth* and ſome a *third* of their lands in tillage every year, yet none put ſo much as *half*, which the defendant had done. The promiſe of cultivating the farm *according to the cuſtom of the country* is laid with reference to and explanatory of the promiſe to uſe and occupy it *in a good and huſbandlike manner*; that is, " one entire term, to occupy, &c. in a good and huſbandlike manner according to the cuſtom," &c.: and it is not laid as two diſtinct allegations to occupy in " a huſbandlike manner *and* according to the cuſtom," &c.

(*a*) 5 *Term Rep.* 373.

Lord

1803.

LEGH *against* HEWITT.

Lord ELLENBOROUGH C. J. The jury have found a verdict for the defendant under an impression that the words in the declaration; "*according to the custom of the country*," required a more strict and specific proof in respect of the relative quantity of land allowed to be annually in tillage than I think they demanded. The words are, that the defendant promised to "use and occupy the premises *in a good and husbandlike manner according to the custom of the country where the said premises lie*." By which I understand the parties to have meant no more than this, that the tenant should conform to the prevalent usage of the country where the lands lie. From the subject-matter of the contract it is evident that the word *custom*, as here used, cannot mean a *custom* in the strict legal signification of the word; for that must be taken with reference to some defined limit or space which is essential to every *custom* properly so called. But no particular place is here assigned to it; nor is it capable here of being so applied. What shall be considered in farming as *a good and husbandlike manner* must vary exceedingly according to soil, climate, and situation. And therefore *the custom of the country* with reference to good husbandry must be applied to the approved habits of husbandry in the neighbourhood under circumstances of the like nature. That is the fair and natural meaning of the words of the contract as laid. And perhaps a contract to occupy an estate in *a good and husbandlike manner* simply would have imposed the same duty on a tenant; because the same sort of evidence, drawn from the approved practice of that part of the country, would have been brought forward to shew what was good husbandry. It would not indeed have been conclusive against a tenant under such a form of declaring, to shew that he had not managed the estate accord-

1803.

LECH *against* HEWITT.

ing to the cuftom of the country, without the addition of thefe words, but ftill they muft be underftood in the manner I have before mentioned. But evidence that an eftate had been managed according to the cuftom of the country would be always a medium of proof that it had been treated in a good and hufbandlike manner. Now here there was no evidence of any cuftom of the country to allow fo much as half the farm to be in tillage at once; for in no inftance was there more than a third. Here therefore there was clear evidence of mifmanagement, contrary to the cuftom of the country in good hufbandry; and the verdict being founded in mifapprehenfion there muft be a new trial.

GROSE J. This is a promife to occupy the land conformably to the prevalent good management of it in that part of the country. Without a leafe, no landlord would let his eftate upon any other terms. Then the queftion is, Whether the defendant did manage the farm in fuch a manner? And that is negatived moft explicitly by the evidence. Some farmers put a fourth, fome as much as a third of their land in tillage at a time: but nobody did or can entertain a doubt but that ploughing half the eftate in one year was bad management. The jury were mifled by what was faid in the courfe of the trial, that the *cuftom* of the country as alleged in the declaration muft be fhewn to be founded on a precife ufage obtaining throughout that part of the country: for upon the merits of the cafe nothing can be more difhoneft than the defendant's conduct appears to have been; and there is no doubt what the verdict would have been had not the jury conceived themfelves bound by the opinion delivered on the form of the declaration.

LAWRENCE

LAWRENCE J. From what has paſſed upon the diſcuſſion of the caſe here, it is evident that the neceſſity of proving a preciſe cuſtom of the country in reſpect to the courſe of huſbandry was inſiſted upon before the jury, and made part of the caſe for their conſideration at the trial; for even now it has been preſſed in argument, that in order to maintain the declaration it was incumbent on the plaintiff to prove a definite known cuſtom or courſe of huſbandry in that country, and that the eſtate was not treated by the defendant according to that known cuſtom: but that was not neceſſary: it was ſufficient to ſhew what was the prevalent courſe of good management there, which was the courſe of management according to good huſbandry which the defendant undertook to obſerve; and by proving that the eſtate was not ſo managed, the plaintiff made out what he undertook to do, namely, that the eſtate was treated in a manner "contrary to good huſbandry and the cuſtom of the country."

1803.

LEGH *against* HEWITT.

LE BLANC J. The jury went on the ground that the words "*cuſtom* of the country" were to be taken in a preciſe ſenſe, as denoting a certain known uniform courſe of huſbandry there eſtabliſhed; but I think the words of the declaration altogether mean no more than if the promiſe had been laid to be ſimply to manage the farm in a good and huſbandlike manner, which muſt always be taken with reference to the uſage and mode of cultivation in that part of the country where the lands lie. For inſtance, it would be no breach of ſuch a contract in *Devonſhire* to ſhew that the farm had not been managed according to the courſe of good huſbandry as uſed in *Norfolk*. This however was a caſe put out of all doubt; for here it was proved that no cuſtom of the country au-

 thorized

1803.

LECH *against* HEWITT.

thorized the manner in which the defendant had treated this estate: and that was sufficient to make out the allegation that he had managed it contrary to good husbandry and the custom of the country.

Rule absolute.

Tuesday, June 28th.

BLOXAM Knt. and Others *against* SURTEES and Others.

After a summons and distringas issued against a privileged defendant in the county where the action is brought, but in which he did not reside, and of which process he had no notice, and returns of non est inventus and nulla bona, a testatum distringas may regularly issue into the county in which he resides and has property, without any new summons in such county; but the sheriff ought not to levy more than 40 s. under such testatum distringas in the first instance, according to the usual course.

A Rule was obtained, calling upon the plaintiffs to shew cause why the several writs of summons, distringas, and testatum distringas, issued in this cause, should not be set aside for irregularity with costs, and why any goods or monies levied thereunder by the sheriff of *N.* should not be returned by the defendants, &c. The irregularity complained of was, that neither Mr. *Burdon*, one of the defendants, having privilege of parliament, nor either of the other defendants, had been served with any summons or other proceedings, or had had notice of the same before the issuing of the testatum distringas under which the sheriff had entered and taken possession of property of one of the defendants to the amount of the debt mentioned in the testatum distringas of 12,000*l.* in the first instance, without any rule to increase issues. But first a summons was sued out in *London* where the action was brought, and where Mr. *Burdon* did not reside, to which non est inventus was returned; and then a distringas in the same county, to which there was a return of nulla bona; and then the testatum distringas into *Northumberland* under which the sheriff was now in possession. Also the levying of the whole debt, without notice in fact in the first instance, was complained of as contrary to the practice, however

it

1803.

BLOXAM and Others against SURTEES and Others.

it might be warranted by the terms of the writ to the sheriff.

Gibbs, in support of the rule.

Garrow and *Curwood*, contrà.

This matter first coming on upon the last day of last term, *The Court* directed that it should stand over till this term, to have an opportunity of considering it more maturely than the time then admitted of: and Lord *Ellenborough* observed, that unless any instance could be shewn of a testatum summons into another county, after an original summons in that in which the action is commenced, (of which none was suggested,) the objection would amount to this, that the plaintiff must lay his venue in the county in which the privileged defendant resided, although, the action being transitory, the law gave him an option in that respect. And now

Lord ELLENBOROUGH C. J. said, that upon consideration they were of opinion that the testatum distringas was not irregularly issued; and referred to 4 *Com. Dig.* tit. *Process—Distringas.* D. 7., where it is said to issue if the defendant does not appear at the return of the summons. But it is also said, that the issues returned upon a distringas ought to be reasonable; in a personal action so much as may be the charge of the process. And he observed, that it was so much of course that the distringas should at first only issue for 40*s.*, that no more ought to be levied by the sheriff in the first instance; and therefore the levying the whole debt at once was improper. The Court therefore ordered that so much of the rule as related to the setting aside the writs of summons, distringas, and testatum distringas, should be discharged, and that upon payment by the defendants of the sum of 40*s.* the goods,

 &c.

&c. levied by virtue of the said writs should be forthwith restored.

BLOXAM and Others *against* SURTEES and Others.

The KING *against* BRISAC and SCOTT.

Wednesday, June 29th.

An information at common law for a conspiracy betweeen the captain and purser of a man of war for planning and fabricating false vouchers to cheat the Crown, (which planning and fabrication were done upon the high seas,) is well triable in *Middlesex*, upon proof there of the receipt by the Commissioners of the Navy of the false vouchers transmitted thither by one of the conspirators through the medium of the post, and the application there by a third person, a holder of one of such vouchers (a bill of exchange) for payment, which he there received.

THE defendant Captain *Brisac* was brought up on a former day of the term to receive judgment, after verdict, upon an information filed against him and the other defendant *Scott;* the first count of which stated in substance, that the defendant *Brisac* was captain, and the defendant *Scott* purser of his Majesty's ship *Iris*, then at sea, and lying in *Brassa Sound*. That it was the duty of *Scott* as purser to procure provisions for the supply of the ship's company, and to draw bills of exchange on the commissioners of the navy for payment: also to procure true receipts from the persons of whom he bought such provisions, witnessed by two of the commission or warrant officers of the ship, to express the quantity and prices of such provisions: also to procure true certificates from two of the principal merchants and inhabitants of the place where such provisions had been bought, that the prices charged in such account were only the then current prices of such articles at that place: also to procure true certificates from the commander, master, and boatswain of the ship, specifying the several species and quantities of such provisions, and that the same had been actually received on board at the times therein mentioned: and also to procure true certificates from the captain that such bills of exchange were drawn by his order and for the purpose of paying for such provisions, and to send the same to the commissioners for victualling the navy for vouchers, &c. That the defendant *Brisac* as captain was in a place of great trust, and that it was his duty as such

to

1803.

The KING *against* BRISAC and SCOTT.

to sign true certificates to the commissioners that the bills drawn by *Scott* on them were drawn by his order, and in payment for the provisions therein mentioned: and also certificates specifying the several species and quantities of provisions, &c. and that the same had been actually received on board the ship at the times therein mentioned. That both defendants not regarding their duties, but fraudulently and deceitfully contriving and intending to cause it to be believed that the defendant *Scott*, as such purser, had bought of one *J. Ross* a much larger quantity of fresh beef, &c. at higher prices than he actually had, for the use of the ship, in order thereby to defraud the King, with force and arms, on the 17th of *October* 1800, at *Brassa Sound* (ss. at *Westminster*) did conspire, &c. together, to charge his Majesty with the payment of more money than was really due or payable for any provisions, &c. in fact procured for the use of the ship's company. That the defendant *Scott* in pursuance of such conspiracy then falsely and fraudulently signed a paper writing purporting to be a bill of exchange upon the commissioners, &c. without inserting therein any particular sum of money, but leaving a blank to be afterwards filled up by the insertion of any sum of money therein, and which was made payable to the said *J. Ross* or order as for fresh beef, &c. supplied for his Majesty's ship the *Iris*. That the defendant *Brisac* in pursuance of the conspiracy, before any sum of money was inserted in the said bill of exchange, falsely and fraudulently signed a certificate at the foot of the said bill that it was drawn by his order, and for the purposes therein mentioned: that both the defendants, before any quantity of provisions had been bought by *Scott* as such purser at any price whatever, &c. at *Lerwick* in *Shetland*, falsely, &c. procured the said *J. Ross*, *R. L.* the master, and

 I. C.

1803.

The King *against* Brisac and Scott.

I. C. boatfwain, being warrant-officers of the faid fhip, to fign a certain other paper purporting to be a receipt from *Rofs*, witneffed by *R. L.* and *I. C.*, for a fet of bills of exchange on the commiffioners for victualling the navy in favour of *Rofs*, without fpecifying any fum of money, but leaving a blank to be afterwards filled up, and which was mentioned to be for certain provifions thereby fuppofed to have been therein-above written, and to have been delivered on board the faid fhip at certain prices, &c. That both the defendants, before any account of any quantity of provifions had been thereon written, procured *N. S.* and *J. M.* to fign a certificate at the foot of the faid laft-mentioned paper writing, purporting to be a certificate in the names of them therein defcribed to be two of the principal merchants and inhabitants of *Lerwick*, expreffing that the prices charged in a certain account thereby fuppofed to have been above written, were only the then current prices of thofe articles at that place. That the defendants, before any account of any quantity of provifions bought by the defendant *Scott* of the faid *J. Rofs* had been thereon written, falfely, &c. did caufe *R. L.* and *I C.*, being mafter and boatfwain, to fign, and both the defendants as captain and purfer did alfo fign a certain other certificate to the commiffioners of the navy, expreffing that the feveral fpecies and quantities of provifions therein mentioned were actually received on board his Majefty's fhip *Iris* in kind between the 20th of *September* and 7th of *October* 1800. That the defendants afterwards caufed to be inferted in the blank fo left in the faid bill of exchange the fum of 558*l.* 6*s.* 4*d.*, whereby the bill of exchange was made to purport to be a bill of exchange drawn by *Scott* upon the commiffioners, &c. for 558*l.* 6*s.* 4*d.*, payable to *Rofs*, &c.; and whereby the certificate fo figned by

1803.

The KING *against* BRISAC and SCOTT.

by the defendant *Brisac* at the foot of it was made to purport that the bill was drawn by his order and for the purpose therein mentioned. That the defendants wrote upon such part of the paper writing as purported to be a receipt from *Ross*, and witnessed by *R. L.* and *I. C.* a false and fraudulent account (which was set out) amounting to 558*l.* 6*s.* 4*d.* for fresh beef, &c. That the defendants caused to be written in the blank left in the receipt so signed by *Ross*, and witnessed by *R. L.* and *I. C.*, 558*l.* 6*s.* 4*d.*, whereby it purported to be a receipt from *Ross*, witnessed, &c. to the defendant *Scott* as purser, for a set of bills of exchange upon the commissioners for victualling the navy for 558*l.* 6*s.* 4*d.* for provisions delivered on board the said ship, and whereby the said certificate so signed by *N. S.* and *J. M.* was made to purport to be a certificate as from two of the principal merchants and inhabitants of *Lerwick*, that the prices charged in the account therein mentioned were only the then current prices at that place. That the defendants caused to be inserted in the certificate signed by defendant *Brisac*, *R. L.*, defendant *Scott*, and *I. C.*, a false and fraudulent account of meat, whereby it was made to purport to be a certificate from the defendant *Brisac*, *R. L.*, the defendant *Scott*, and *I. C.*, (as such captain, &c.) that the provisions so inserted had been actually received on board the said ship between the 20th of *September* and 7th of *October* 1800, with intent to send the same to the commissioners as and for just and true vouchers that the defendant *Scott* had procured such provisions at the prices charged, and that the same had been actually received on board, and that the bill was drawn for the amount thereof; whereas in fact the defendant *Scott* had not as such purser bought, between the 20th *September* and 7th of *October* of *Ross*, the provisions in said bill of ex-

 change,

1803.

The King *against* Brisac and Scott.

change, account received, and certificate mentioned, nor any provisions to the value in the bill mentioned, &c. (and so negativing the truth of the other facts meant to be established by the vouchers.) That in further pursuance of the conspiracy, they caused the said bill of exchange, &c. to be sent to the commissioners for victualling the navy, and published as true vouchers, to wit, at *Westminster*, &c.

There were various other counts charging in substance the same transaction, or different parts of it. The 11th count charged that the defendants conspired as before, and that in pursuance of the said conspiracy they did knowingly, falsely, and fraudulently send and deliver, and cause to be sent and delivered to the commissioners for victualling, a certain other false and fraudulent bill of exchange, with a certain other false and fraudulent certificate thereunder written, and also a certain other false and fraudulent account and receipt, together with a certain other false and fraudulent certificate thereupon indorsed, &c. (setting out the purport of the several instruments, viz. the bill of exchange drawn on the commissioners by *Scott* in favour of *J. Ross*, and certified by *Brisac*, for 558*l.* 6*s.* 4*d.* as for so much victuals, &c. supplied for the *Iris*; and the account made out by *J. Ross* to that amount, with his receipt, and the certificate of two persons as merchants and inhabitants of *Lerwick*, certifying the prices charged to be the current prices at the time for the articles;) and did then and there utter and publish the same as and for just and true vouchers, &c. with intent to defraud the King: whereas *Scott* had not bought, &c. (negativing the truth of the facts vouched by those papers).

At the trial before *Lawrence* J. at *Westminster*, the substance of the facts, as stated in the first and eleventh counts, were proved. But all the acts in which either of the

1803.

The KING *against* BRISAC and SCOTT.

the defendants immediately took a part were done by them either on the high ſeas at *Braſſa Sound*, or at *Lerwick* in the *Iſle of Shetland*. The only acts proved to be done in *Middleſex* were thoſe which were done by them mediately, through the intervention of innocent perſons, namely, the delivery of the vouchers (tranſmitted through their hands by the defendants) to the commiſſioners of the victualling, and the application for and receipt of payment there by the holder of one of the bills of exchange mentioned in the information. Whereupon when the defendant Captain *Briſac* (who alone was forthcoming after conviction, the other defendant having abſconded ſince the trial) was brought up for judgment, it was objected by

Beſt Serjt. and *Marryat*, that the whole of the *conſpiracy*, which was the gift of the offence charged in the information, was committed upon the high ſeas, and therefore under the expreſs proviſions of the ſtatutes 28 *Hen.* 8. *c.* 15. and 39 *Geo.* 3. *c.* 37. the offence was triable under the Admiralty commiſſion thereby directed. That it made no difference that the ultimate object and completion of the conſpiracy was to operate on ſhore, as all the acts of the defendants themſelves which conſtituted the offence of conſpiracy were committed out of the juriſdiction of the common law.

Erſkine, *Garrow*, *Jervis*, and *Peake*, for the Crown, reſiſted the objection; becauſe a conſpiracy was an offence not merely reſting in the mind, but ſhewn by overt acts done to carry it into execution: and here the information ſtated, that in further purſuance of the conſpiracy the defendants cauſed the falſe vouchers to be ſent to the commiſſioners for victualling the navy, and did deliver the ſame

to

1803.

The King *against* Brisac and Scott.

to them, &c. and did utter and publiſh the ſame as true: all which were proved to have happened in the county of *Middleſex*. For the letter conveying the bill of exchange, which had been put into the poſt at *Lerwick* by one of the conſpirators to be delivered in *Middleſex*, and which was accordingly there delivered, was an act done there in furtherance of the conſpiracy, for which both the conſpirators were anſwerable as much as if it had been delivered there by their own hands; and ſo the act of receiving the money upon it afterwards at *Somerſet Houſe* by the holder is alſo imputable to thoſe by whoſe procurance it was thus done.

The Court then ſaid they would take the objection into conſideration; and remanded the defendant, to be brought up again on this day; when

Grose J., in paſſing ſentence, delivered the opinion of the Court upon the objection. As to the objection which has been ſuggeſted by the defendant's counſel (and of which he would have had the full benefit allowed him, if it were available in law, although the time for a new trial be long ſince elapſed); we are of opinion, that it is not ſufficient to prevent our giving the judgment of the Court. It is objected that the miſdemeanor charged on this indictment was committed on the high ſeas, and as that offence is, by virtue of the ſtat. 39 *G.* 3., now made triable under the King's commiſſion, to be granted by virtue of the ſtat. 28 *H.* 8. *c.* 15., that it cannot properly be tried within the body of any county in *England*. As to which, it may be in the firſt place obſerved, that that ſtatute makes no difference in this caſe; it does not take away any juriſdiction as to the trial of any offences

6 which

1803.

The KING *against* BRISAC and SCOTT.

which might have before been tried in the courts of common law, becaufe a place and forum of trial is affigned for offences committed at fea, which did not, as to them, exift before. If it were neceffary on this occafion to confider how far every count in this information has been eftablifhed by the evidence adduced, fo as to bring every one of them within the jurifdiction of this Court, it would be to be recollected that confpiracy is a matter of inference, deduced from certain criminal acts of the parties accufed, done in purfuance of an apparent criminal purpofe in common between them, and which hardly ever are confined to one place; and that from analogy, there feems no reafon why the crime of confpiracy, amounting only to a mifdemeanor, may not be tried wherever one diftinct overt act of confpiracy is in fact committed, as well as the crime of high treafon in compaffing and imagining the king's death, or in confpiring to levy war. In the *King* v. *Bowes and others* (*a*) the trial proceeded upon this principle; where no proof of actual confpiracy embracing all the feveral confpirators was attempted to be given in *Middlefex*, where the trial tookplace, and where the individual actings of fome of the confpirators were wholly confined to other counties than *Middlefex*: but ftill the confpiracy as againft all having been proved from the community of criminal purpofe, and by their joint co-operation in forwarding the objects of it, in different places and counties, the locality required for the purpofe of trial was holden to be fatisfied by overt acts done by fome of them in profecution of the confpiracy in the county where the trial was had. But upon this occafion it is not neceffary to go at large into this point; for the eleventh and other counts in this information charge that

(*a*) The defendants received fentence in this Court in *Trinity* term 1787.

the

1803.

The KING *against* BRISAC and SCOTT.

the defendants fraudulently ſent and delivered to the commiſſioners for victualling the navy a falſe and fraudulent bill of exchange, and a falſe and fraudulent account, with falſe and fraudulent certificates, and publiſhed the ſame as juſt and true vouchers that *Scott* had bought the quantities of proviſions therein mentioned, and at the prices therein ſpecified; whereas in fact he had not bought ſuch quantities of proviſions, nor any proviſions at thoſe prices; in order thereby to cheat and defraud the King, in purſuance of a conſpiracy between them to charge the King with more money than was due for any proviſions bought or procured by the defendant *Scott*. That the delivery of ſuch falſe vouchers, with ſuch fraudulent intent, in purſuance of a conſpiracy for that purpoſe, is an offence in the place where the vouchers were delivered, is a matter which cannot be doubted; though the conſpiracy may have been in another place. And in the preſent caſe, the delivering the vouchers, and the preſenting the bill of exchange to the commiſſioners of the victualling-office in *Middleſex*, were the acts of both the defendants, done in the county of *Middleſex*: I ſay it was *their* acts, done by them *both*; for the perſons who innocently delivered the vouchers were mere inſtruments in their hands for that purpoſe; the crime of preſenting theſe vouchers was excluſively *their own*, as the crime of adminiſtering poiſon through the medium of a perſon ignorant of its quality would be the crime of the perſon procuring it to be adminiſtered.

The ſentence then paſſed on the defendant was, that he ſhould pay a fine of 300*l*., and find ſureties for his good behaviour, &c. and be impriſoned in the *King's Bench* priſon eighteen months, and ſtand once during that time in the pillory.

5

1803.

JOHNSON *against* TOULMIN.

Wednesday, June 29th.

If the award of the writ of inquiry on the roll be right, the teste of the writ, if wrong, shall be amended by it.

A Rule called on the defendant to ſhew cauſe why the plaintiff ſhould not be at liberty to alter the teſte of the writ of inquiry of damages iſſued and executed in this cauſe, by teſting the ſame the laſt day of *Eaſter* term. This was obtained upon an affidavit ſtating that notice of executing the writ had been regularly given for the 21ſt of *April*, which writ was properly teſted the 12th of *February* preceding; that the execution of it was ſuſpended by a propoſed reference, which afterwards went off; upon which a freſh notice was given for the 25th of this preſent *June*. That the writ of inquiry remained in the ſecondary's office until the time when it was executed, previous to which the return therein was altered and the writ re-ſealed, but the teſte thereof was by miſtake omitted to be altered.

Comyn ſhewed cauſe, and cited *R.* v. *Tuchin* (*a*), where it was ruled upon long debate that the teſte of the diſtringas was not amendable at common law, and being a criminal caſe was not holpen by the ſtatutes of amendments. And even in civil caſes thoſe ſtatutes will not help without the aid of ſomething to amend by. Now here is nothing to amend by: it is no miſtake of the officer of the court, but of the attorney. He alſo cited *Parſons* v. *Lloyd* (*b*), where, a term intervening between the teſte and return of a capias, it was holden void, and the party taken on it entitled to his action of falſe impriſonment.

(*a*) 2 *Ld. Raym.* 1061. (*b*) 2 *Blac.* 846.

Wigley,

1803.

JOHNSON *against* TOULMIN.

Wigley, in support of the rule, said that there was something to amend by, namely, the award of the writ of inquiry upon the roll, which was then in court, the date of which was right; and cited *Wolley* v. *Mosely* (*c*), *Hammond* v. *Pursell* (*d*), and *Couden* v. *Coulter* (*e*).

Lord ELLENBOROUGH C. J. Where the amendment required is according to the truth, and there is something to amend by, there is an end of the question.

Per Curiam, Rule absolute.

(*a*) *Cro. Eliz.* 760. (*b*) *Carth.* 70. (*c*) *Rep. temp. Hardw.* 314.

Wednesday, June 29th.

The KING *against* HILL DARLEY.

After verdict of guilty upon an indictment on the stat. 9 *Ann. c.* 14. for an assault on account of money won at gaming, the return to the writ of certiorari which had been issued at the instance of the defendant was amended by inserting in the return of the caption the true time when, and the names of the justices before whom, the quarter sessions at which the indictment was found was holden, and the names of the jurors by whom it was found. And the entry roll and record of Nisi Prius were also amended, as to the caption of the indictment, (but not as to the names of the grand jurors,) by making the same agree with the caption so amended. If the jury find that the assault was *on account of money won at play*, the case is within the statute 9 *Ann c.* 14., though the assault were committed at a subsequent time and place, and after abusive language between the parties in respect of such money won.

THIS was an indictment removed into this court by certiorari for an assault and battery, which was tried before *Heath* J. at the last assizes in *Sussex*; the two first counts of which were framed upon the stat. 9 *Ann. c.* 14.; the first stating that the prosecutor *S. Embden* on the 10th of *August*, 42 *Geo.* 3. at *Brighton*, &c. did, by playing at dice, win of the defendant 50*l.*, and that *S. E.* having so won the said sum by playing at dice as aforesaid, the defendant afterwards on the 11th of *August* in the same year, with force and arms at *B.* aforesaid, &c. did *assault* and beat the said *S. E. upon account of the said money so won* by the said *S. E.* playing at dice as aforesaid, contrary to the form of the statute. The second count only varied from the first in stating that the money was won by betting at a game of dice. There was a third count

for

1803.

The KING *against* DARLEY.

for a common aſſault. Plea not guilty. After a general verdict of guilty;

Gurney, for the proſecutor, moved in the laſt term upon an affidavit of the clerk of the peace for the county of *Suſſex*, ſtating that the indictment, which appeared by the caption returned to have been found at the *Midſummer* general quarter ſeſſions of the peace, was not found then, but at the *Michaelmas* ſeſſions following, for a rule calling upon the defendant to ſhew cauſe, why upon reading the affidavit of *W. E.* and a parchment writing thereto annexed, and the minutes of the Court before which the indictment in this proſecution was found, now produced and ſhewn to this Court (*a*), the return to the writ of certiorari iſſued by this Court at the inſtance of the defendant ſhould not be amended by inſerting in the return of the caption the time when the general quarter ſeſſions of the peace at which the ſaid indictment was found was holden, and the names of the juſtices by whom the ſaid ſeſſion was holden, and the names of the jurors by whom the ſame was found, according to the truth of the fact. And why the entry-roll in the treaſury and alſo the record of Niſi Prius ſhould not be amended as to the caption of the indictment, by making the ſame agree with the caption when ſo amended. This rule was framed upon the precedent in *Rex* v. *Atkinſon* (*b*), which was obtained from

(*a*) The clerk of the peace attended with his book of minutes in court, for the purpoſe of its being inſpected.

(*b*) *The King* v. *Chriſtopher Atkinſon*, E. 24 *Geo.* 3. "Upon reading the affidavits of *J. W.* and *J. P.*, and alſo on reading the commiſſion of oyer and terminer for the county of *Middleſex*, and the minutes of the court before which the indictment in this cauſe was found, now produced and ſhewn to this Court, it is ordered that *Wedneſday* next be given to the defendant to ſhew

1803.

The KING *against* DARLEY.

from the Crown-office. And on a subsequent day of the term, *Erskine* for the defendant admitting that he could not oppose the amendment prayed, the rule was made absolute.

On a former day in this term, the defendant being brought up for judgment, the report of the evidence was read, whereby it appeared, from the prosecutor's evidence, that on the 10th of *August* last, at *Brighton*, he met the defendant at the *New Ship Inn*, when the defendant proposed to him to play at a game with dice called "under seven and over seven;" and if the dice fell at seven, the house took the profit.

---

shew cause why the return to the writ of certiorari, issued by this Court at the instance of the defendant, should not be amended, by inserting therein the commission of oyer and terminer by virtue of which, and also the names of the justices by whom, the above mentioned court was holden at the time when the said indictment was found, according to the truth of the fact appearing by the said commission and the minutes above mentioned, now produced to this Court as aforesaid: and also why the caption of the said indictment should not be thereby amended, and made agreeable to the said return when so amended as aforesaid. And also that the defendant shall, upon the same day, shew cause why the aforesaid caption should not be likewise amended, by inserting therein the names of the jurors by whom such indictment was found, as stated in the return already made to the said certiorari: upon notice of this rule to be given to the said defendant, and also to the clerk of the justices named in the said commission of oyer and terminer, or his deputy, in the mean time." This rule was afterwards made absolute, on the motion of the Attorney-General.

Trin. 24 *Geo.* 3. "It is ordered that the entry roll in the Treasury, and also the record of Nisi Prius in this cause, be amended, as to the caption of the indictment, by making the same agree with the amended caption lately returned into this Court by the clerk of the peace of the county of *Middlesex*, and filed in this Court; by virtue of a rule of this Court made in the last term."

In a subseqent case, of *The King* v. *Aylett*, *H.* 27 *Geo.* 3., Mr. Justice *Buller* said, that the amendment of the *roll*, by inserting *the names of the Grand Jurors*, was unnecessary, the practice of the Crown-office warranting the omission of their names And in the present case, of *R.* v. *Darley*, the roll and record of Nisi Prius were not amended by inserting the names of the Grand Jurors; this being considered as unnecessary.

1803.

The KING *against* DARLEY.

profit. At the end of the play the profecutor, who had loft at firft, got up a winner of 50*l.*; when the defendant faid, that if the profecutor would meet him at another day he mentioned, he would pay him, and defired him to call at the *Old Ship Inn* where the defendant lived. The next day the profecutor met the defendant at the defendant's lodgings, in company with fome others, when the defendant propofed that he fhould put down 100*l.*, and the profecutor 50*l.*, and that they fhould play for it at 5*l.* a throw. This being declined, and the profecutor repeating his demand of the 50*l.* owing to him, the defendant told him that if he would not play he was a great rafcal. The profecutor anfwered, that he was no more a fcoundrel than the defendant; that he had heard of his having cut the dice, and therefore had no reafon to complain of unfairnefs, and after infifting again on receiving his 50*l.*, told the defendant that if he looked in the glafs he would fee a rafcal. The profecutor then endeavoured to go out of the room, faying he fhould purfue his own remedy, but the defendant faid he fhould not pafs till he told him what remedy he meant to purfue, and that if he would not tell, he (the defendant) would make him. The profecutor faid that was more than he dared to do. The defendant then ftruck the profecutor with his fifts feveral times, and abufed him, and kicked him down ftairs, faying that he was befet with fharpers and thieves. Another witnefs who was prefent, and interfered to prevent the violence, confirmed this account.

Erfkine, and *Beft* Serjt., on the part of the defendant, objected that the evidence did not warrant a verdict of guilty upon the fpecial counts framed on the ftat. 9 *Ann.* *c.* 14., but only upon the third count for the common

 affault:

1803.

The KING *against*. DARLEY.

assault: for it appeared that the assault was not committed *at the time of the play*, but the day afterwards; and that not *on account of the money won at play*, but on account of the *abusive language* which passed between the parties. And they cited the opinion of *Buller* J. in *Rex* v. *Randal and others* (a) to that effect: and observed in corroboration of that opinion, that the great object of the statute, which was a very severe one, (including no less than the forfeiture of all the party's personal estate, as well as imprisonment for two years,) was to repress such violence upon the spot and at the very time of the gambling, when it might reasonably be imagined that ruined men in the first paroxysm of despair would be tempted to vent their passion in this manner. And the statute, being so penal, was not to be applied to an indefinite period of time, and through collateral causes, though deducible from the original loss of money at play. And if it were not confined to the actual time and place of play, or before any other matter intervened, no other line of limitation could be drawn.

Lord ELLENBOROUGH C. J. said, that the Court would refer to the learned Judge before whom the indictment was tried, to know in what manner the case was left to the jury; whether the assault were in fact made on account of the money won at play the day before, or on account of the ill language which had arisen afterwards upon the demand of payment being made. But he said, that he could not go the length of the opinion in the case cited, and consider the words of the act as confined to an assault committed during the time of play; for it more

(a) 1 *East's P. C.* 423.

frequently

1803.

The KING *against* DARLEY.

frequently happened that disputes of that sort did not arise till after the play was over.

The Court afterwards referred to Mr. Justice *Heath* to know in what manner the question had been left to the jury; when he returned for answer, that he had directed the jury to acquit the defendant on the first and second counts, if they were not clearly satisfied that the defendant had assaulted the prosecutor *on account of the money won at play* by the prosecutor of the defendant: and that he had distinctly left it to them to decide whether the assault were *on that account*, or *on account of the abusive language then used;* and if they were of opinion that it was on the latter account, they should acquit the defendant on those counts.

After this answer had been communicated from the bench, *Erskine* moved in arrest of judgment, on the ground that, the verdict being general, there would be inconsistent judgments on the several counts, one on the special counts on the statute which prescribed a positive punishment, and the other on the count for the common assault which was discretionary; and he referred to the opinion delivered in *Rex* v. *Young and others* (*a*). This rule was however afterwards abandoned. And

GROSE J. proceeded to pass sentence upon the defendant pursuant to the directions of the statute.

(*a*) 3 *Term Rep.* 103, &c.

1803.

Wednesday, June 29th.

HEWARD *against* SHIPLEY.

[I was not in court when this cafe was argued and determined, which was not till late at night on the laft day of the term; but I was furnifhed with the papers and the fhort-hand-writer's notes of the judgment by fome of the counfel in the caufe, from which, with only a few neceffary and obvious corrections, and fome omiffions of collateral matter which did not bear upon the general queftions, I have been enabled to draw up this Report.]

In an action on the ftat. 2 *G.* 2. *c.* 24. for bribery at an election for members to ferve in parliament, it is no objection to the competency of a witnefs for the plaintiff to prove fuch bribery, that a fimilar action was pending againft the witnefs himfelf for bribery at the fame election, and that he claimed to be the firft *difcoverer* of the bribery of the defendant, and meant to avail himfelf of it, if neceffary, in cafe of the defendant's conviction.

Where the evidence given by fuch a witnefs of the defendant's bribery was by means of the defendant's *confeffion* of it to the witnefs; held that the truth of the fact fo confeffed as well as of the confeffion of fuch fact, was material for the confideration of the jury.

THIS was an action upon the bribery act, 2 *Geo.* 2. *c.* 24. charging the defendant with having corruptly afked, taken and received from one *John Robinfon*, at *Weftminfter*, in the county of *Middlefex*, a certain fum of money by way of gift and reward for giving his vote at the laft election of members of parliament for the city of *Durham* for *Richard Wharton* Efq. one of the candidates on that occafion. The caufe was tried before Lord *Ellenborough* C. J. and a fpecial jury at *Weftminfter* at the fittings after laft *Eafter* term, when a verdict was found for the plaintiff for one penalty of 500*l.* Two other cafes of the fame defcription, one of *Smith* v. *Catchefide*, the other of *Heward* v. *Grainger*, in which the fame queftions arofe, were tried before *Lawrence* J. at the fame fittings; and as far as they embraced the fame general queftions I have blended the confideration of them together.

Rules were obtained on a former day, calling on the plaintiffs to fhew caufe why the feveral verdicts fhould not be fet afide, and new trials had, on two grounds; 1ft,

(which

1803.

HEWARD *against* SHIPLEY.

(which applied to the case of *Heward* v. *Shipley*,) that Sir *H. V. Tempest* having a similar action for bribery depending against himself, and claiming to be the first *discoverer* to the plaintiff in this action, whereby if substantiated he might protect himself against the action in which he was defendant, was therefore not a competent witness to prove the bribery, which he did at the trial by proving the confession of the defendant that he had been bribed. 2dly, That the verdict was against the weight of evidence.

Erskine, *Garrow*, *Holroyd*, and *Fergusson*, now shewed cause against the rule; and

Dallas, *Gibbs*, *Wood*, and *Hullock*, were heard in support of it.

Lord ELLENBOROUGH C. J. Assuming for the sake of the argument (a fact of which his Lordship intimated strong doubts) that Sir *Henry Vane Tempest* was the *discoverer*; and it has been truly observed, that whether he were the discoverer or not, his testimony being given under the idea that he was so, and entitled to the benefit of that character, he is as much disqualified in point of interest, if disqualified at all, as if he were actually such: assuming him therefore to be a discoverer, the question is, Whether he be disqualified on that ground? I should have little difficulty, if this were a case at common law, in saying, that a person obtaining a verdict by his own evidence, which will enure to his own benefit, not merely upon a probable and contingent expectation that such will be the effect of his testimony, but where it is the immediate and natural effect of it, is a person at common law interested in the event, and therefore disqualified in the matter respecting which such testimony is given. The case of

Bent

1803. HEWARD *against* SHIPLEY.

Bent v. *Baker* (*a*) is an authority in point to disqualify a man from giving evidence who is interested in the subject matter of the suit, and where the verdict may be made evidence for him. But the question here is, whether under the particular provisions and policy of the bribery act he be or be not a competent witness. Now looking no further than the case of *Bush* v. *Ralling* (*b*) which lies before me, it is there decided by judges of the highest learning and talents, Lord C. J. *Ryder* (*c*), and the Judges *Denison*, *Foster*, and *Wilmot*, who had considered the subject with the greatest attention, that a person standing in that situation is a competent witness. The case of *Phillips* v. *Fowler* before Lord C. J. *Eyre*, there cited, goes to establish the same point. It is indeed extraordinary that the objection that such a witness was a particeps criminis should have occasioned any doubt, after the determination in the case of *The King* v. *Rockwood* (*d*) by Lord *Holt*, and other cases of the like nature. There are many cases where, though the tendency of a man's evidence be to promote his own advantage, or to give him a certain reward, yet he is a competent witness. It is argued however, that there is a distinction between civil and criminal cases in this respect, which has been much pressed at the bar. But whatever weight there may be in this distinction, and though this be in the shape of a civil action, it may be asked whether, since it is brought to recover a penalty of 500*l.*, and where a conviction is followed by

(*a*) 3 *Term Rep.* 27. and vide *Bell* v. *Harwood*, *ib.* 308. and *Smith* v. *Prager*, 7 *Term Rep.* 60.

(*b*) *Sayer*, 289.

(*c*) Lord C. J. *Ryder* was dead when the judgment was delivered; but Mr. Justice *Denison* in deliverig the opinion of the Court stated that the Ld. C. J. had concurred in opinion with the rest of the Court.

(*d*) 4 *St. Tr.* 684—6.

certain incapacities (*a*), it be not ſo much of a criminal nature as to bring it within the principle of *The King* v. *Teaſdale* (*b*). I do not however reſt on this ground, but on the ſtatute. And I conſider this as falling within another claſs of caſes, where a man is made a witneſs by legiſlative declaration. By ſ. 8. of the bribery act it is enacted, that any offender againſt the act diſcovering within a certain time any other offender within the act, ſo that the perſon ſo diſcovered be thereupon convicted, the diſcoverer, not having been before that time himſelf convicted of the offence, ſhall be indemnified and diſcharged from all penalties and diſabilities incurred under the act; that is, he ſhall have the benefit of uſing the verdict againſt the other offender for his own indemnity. Now it is not probable that the Legiſlature would have made that proviſion with regard to a diſcoverer, unleſs they had intended he ſhould be a witneſs: for if he were not, ſuch a proviſion would be almoſt nugatory and uſeleſs: it would be holding out an inducement for parties to make a diſcovery, and when made, they would be precluded the benefit of it. I think therefore that the ſtatute has given a parliamentary capacitation to the witneſs through whom the fact is diſcovered, and who might otherwiſe at common law have been incapacitated. His Lordſhip alſo alluded to the caſe of the party robbed admitted as a witneſs in an action againſt the hundred, upon the ſtatute of *Winton* (*c*), and other caſes of the ſame kind which had been mentioned in the argument. Suppoſing then Sir *H. V. Tempeſt* to be a competent witneſs, which was the firſt thing to be determined, the remaining queſtion is, Whether the evidence as left to the jury did not ſo far preponderate againſt the plaintiff,

1803.

HEWARD *againſt* SHIPLEY.

(*a*) Vide 2 *Geo.* 2. *c.* 25. *ſ.* 7. *i. e.* voting for members of parliament, or holding any corporate office.

(*b*) 3 *Eſpin. N. P. Caſ.*

(*c*) 13 *Ed.* 1. *ſt.* 2. *c.* 1, 2.

1803.

HEWARD *against* SHIPLEY.

plaintiff, that it is fit it ſhould go to the conſideration of a ſecond jury. Here his Lordſhip took a review of the evidence, which turned upon the queſtion of colluſion, and concluded that the cauſe ought to go to the conſideration of another jury; ſaying, that it was not enough that the witneſs depoſed truly as to the fact of a confeſſion of bribery made by the defendant, but they ſhould be ſatisfied of the truth of the fact itſelf of ſuch bribery.

LAWRENCE J. (*a*). As to the admiſſiblity of Sir *H. V. Tempeſt* as a witneſs, from the conſtruction which ought to be put upon the ſtatute, I think he was a competent witneſs in this caſe. An action of this ſort (*b*) was brought before me when I was upon the laſt *Oxford* circuit, againſt a man who, in the ſtreets of *Leominſter*, ſolicited a bribe for his vote of Mr. *Kinnard*, and another gentleman who was a candidate with him. Mr. *Kinnard* was called as a witneſs, and it appeared from his evidence that an action was brought againſt him for bribery, and was at iſſue. He appeared, therefore, to have ſo direct an intereſt in that cauſe, that I conceived he was not an admiſſible witneſs, and I rejected him. At that time I was not aware of the deciſions made on the ſtatute. And, if I remember right, the diſtinction then taken was this; that though a man were liable to ſuch an action, yet, where no action was then brought, he was not diſqualified from being a witneſs; becauſe, although he were in a ſituation amenable to ſuch an action, yet, as it was uncertain whether that action might be brought or not, it was not that ſort of intereſt which diſqualified him, but that where an action was pending he had ſo direct an intereſt in it that he could not be examined as a witneſs. On a motion for a new trial, that point was not

(*a*) Mr. Juſtice *Groſe* was not in court at this time.

(*b*) *Edwards* v. *Evans*, 3 *Eaſt*, 451.

decided,

1803.

HEWARD *against* SHIPLEY.

decided, but it went off on another ground, and therefore the Court did not think it neceffary to decide the point. Then as to the cafes that have been cited, and which have been under the confideration of the Court at different periods; in the cafe of *Bufh* v. *Ralling* (*a*), the Court held that the ftatute made fuch a perfon a witnefs notwithftanding his intereft. And that cafe feems to be agreeable to the other which was cited, *Mead* v. *Robinfon* (*b*), of which I have a manufcript note; according to which Mr. J. *Abney* conceived that the objection went merely to his credit, and not to his competency. The other Judges put it on the ground that the two years had expired. Thefe cafes, I think, have decided that a perfon who is a difcoverer is a competent witnefs; and therefore Sir *H. V. Tempeft* was properly admitted; fuppofing, in this cafe, that which may be matter of confideration, that he was a difcoverer. The next queftion will be, Whether it be proper to fend this cafe to the confideration of another jury? When firft this matter was moved, I doubted whether I gave correct directions to the jury. As the defendant thought proper to confefs that he was bribed, it was not made any queftion to the jury whether he fpoke what was true; I thinking it would do no mifchief to any other perfon; and that if the defendant chofe deliberately to make a confeffion, which confeffion was fairly given in evidence, whether it were correctly true or not, at leaft that he would have no reafon to complain, and that no others could complain. But on further confideration of the effect of fuch confeffion on the rights of others, although the defendant himfelf, againft whom a verdict was given, could have no right to complain of it, I do not think that that was the

(*a*) *Sayer*, 289. (*b*) *Willes*, 422.

1803.

HEWARD *against* SHIPLEY.

correct way of viewing the case; because great difficulties may be thrown in the way of persons who may be plaintiffs against Sir *H. V. Tempest* to get rid of the fraud, if it be such; and if the Court have reason to think this is a contrivance of Sir *H. V. Tempest* for the purpose of bringing forward that which is no bribe in order to protect himself, the Court ought to remit it to another jury, that it may be seen whether or no this man has stated what is true, or whether it is not all misrepresentation and contrivance to answer the purpose of indemnity and protection against actions that may be brought against the witness. He then alluded to the circumstances of the case, and the parties to the action, which raised a suspicion of collusion, and required the consideration of another jury.

LE BLANC J. I think there ought to be a new trial in this case. And it cannot be necessary, after the determinations that have been cited at the bar, to say much with respect to the admissibility of a witness in the situation of a discoverer. Whatever may be the situation of a person having such an interest, independent of the statute, yet I think, from the necessary construction of the statute, it is clearly to be inferred that it meant to make the party a competent witness, who should make the discovery. It is clear, from the clauses of that act, that the object of the legislature was to bring to light those transactions that passed only in secret between the person giving and the person receiving the bribe. And the statute holds out an encouragement to persons receiving the bribe to convict those who gave it. Now that can only be done by the persons who received it. And therefore, from the whole taken together, it appears clearly from the act, while it held out this indemnity to the person making

the diſcovery, it had in contemplation that ſuch a perſon ſhould be admitted as a competent witneſs to prove the fact at the trial. That ſuch has been the opinion of the Judges on that point, ſeems, I think, to have been taken for granted, though not laid down in poſitive terms. And, in addition to that, notwithſtanding the number of caſes that have been tried on ſuch evidence, no objection of this ſort has been taken to the teſtimony of ſuch perſons. With reſpect to Sir *H. V. Tempeſt*, looking at the caſe in another point of view, it preſents great doubts whether, if the verdict ſhould ſtand, it could operate as an indemnity againſt any action brought againſt him. It ſeems to be clear it ought to go before another jury for their reviſion. The circumſtances of the caſe are pregnant with contrivance, &c. But as the charge in this caſe is of extenſive conſequence relating to the adminiſtration of the juſtice of the country, the public are more intereſted than the parties litigating; and therefore it is material, leſt ſuch a contrivance ſhould prevail in a court of juſtice, that this matter ſhould undergo the fulleſt conſideration that can be given to it. I do not conſider it as a caſe between one *Heward*, who appears as a plaintiff, and one *Shipley*, who confeſſed himſelf guilty of the offence; but as a caſe where neither of thoſe two parties has an intereſt; and where there are other actors, who have a more extenſive intereſt and concern than theſe two parties: and it is neceſſary, therefore, conſidering the conſequences of this action, that this caſe ſhould be ſifted and fully conſidered.

Rules abſolute.

1803.

Reardon *against* Swaby (*a*).

A cognovit containing any matter of *agreement*, as to take the debt *by instalments*, ought to have an agreement ftamp; and if it have not, proceedings may be fet afide for irregularity.

ON a motion to fet afide proceedings for irregularity, one of the irregularities ftated was, that the cognovit on which judgment had been figned and execution iffued, was not *ftamped*: which was contended on the other fide not to be an *irregularity*. But

The Court thought otherwife, and made the rule abfolute; it appearing that the cognovit contained an *agreement* to take the debt *by inftalments*, which therefore ought to have been ftamped, upon the authority of *Ames* v. *Hill* (*b*): though a mere cognovit without any matter of agreement did not require a ftamp.

(*a*) Ex relatione Mri *Groves*, in *Eafter* term laft; at a time when I was not in court.

(*b*) 2 *Bof. & Pull.* 150.

END OF TRINITY TERM.

CASES

ARGUED AND DETERMINED

IN THE

Court of KING's BENCH,

IN

Michaelmas Term,

In the Forty-fourth Year of the Reign of GEORGE III.

1803.

GRANT *against* FAGAN.

Monday, Nov. 7th.

The time for bail to render their principal will not be enlarged because of the unwarrantable arrest and detention of the principal by a foreign enemy.

JEKYLL moved to enlarge the time for the bail to render their principal, upon an affidavit that the principal, who was in *France*, and about to return to this country, had been detained as a prisoner of war under the late edict of the *French* government, under which, contrary to the former usage of nations, they had arrested all *British* subjects who happened to be in *France* at the breaking out of hostilities between the two countries. And he compared this to the cases where the bail of defendants, sent out of the kingdom under the alien act (*a*) had been relieved; as also were the principals, after their arrest and giving bail, had become peers (*b*), or members of [190]

(*a*) 33 *Geo.* 3. *c.* 4. Vide *Merrick* v. *Vaucher*, 6 *Term Rep.* 50., and *Coles* v. *De Hayne*, *ib.* 52. So in the case of transportation of the principal. *Wood* v. *Mitchell*, *ib.* 247.

(*b*) *Trinder* v. *Shirley*, *Dougl.* 45.

the

1803.

GRANT
v.
FAGAN.

the House of Commons (a); in which, and similar cases, the bail were considered to be under no imputation of laches; it becoming out of their power, without any fault of theirs, to comply with their undertaking to render the principals.

Lord ELLENBOROUGH C. J. In all those cases the render becomes impossible by the act or law of our own State, which excuses the performance of the condition; but there is no case where this indemnity has been induced by the act of a foreign power. And as to the incapacity of the bail to render their principal, arising without any default of their own, the same excuse might as truly be made in the case of the sickness of the principal, so as to make him incapable of removal without endangering his life, where, nevertheless, the bail are answerable (b).

Per Curiam, Rule refused.

(a) *Langridge* v. *Flood*, *H.* 26 *G.* 3 1 *Tidd*, 152.
(b) *Wynn* v. *Petty*, *ante*, 102.

Monday, Nov. 7th.

BUNN, Executor of BUNN, *against* GUY.

A contract entered into by a practising attorney to relinquish his business and recommend his clients to two other attornies for a valuable consideration, and that he would not himself practise in such business within certain limits, and would permit them to make use of his name in their firm for a certain time, but without his interference, &c. was holden to be valid in law.

UPON a question arising in the Court of Chancery, concerning the marshalling of assets, the following case was sent by the Lord Chancellor for the opinion of this Court, as to the validity of the securities after mentioned.

*[191] * Mr. *C. Carpenter* having, before the 6th of *December* 1797, been admitted and practising as an attorney and solicitor of the courts in *London*, agreed with Mr. *J. Bunn* (since deceased) and Mr. *J. Guy*, who had also been previously admitted and were then practising as such attornies and solicitors, in consideration of the sums of money and annuity, &c. after mentioned, to relinquish and make over his practice and business to them upon the conditions specified in the agreement hereinafter set forth. Accordingly, on the 6th of *December* 1797, by articles of agreement duly stamped, sealed, and executed by *C. Carpenter* on the one part, and *J. Bunn* and *J. Guy* of the other part, *C. Carpenter*, in consideration of the several sums of money and annuity herein-after mentioned to

1803.

BUNN *against* GUY.

to be paid and secured to him, agreed that he would, on the 25th of the same *December*, relinquish and make over unto *J. Bunn* and *J. Guy* all benefit and advantage of his business as an attorney, solicitor, and conveyancer, so far as respected his practice in the profession of the law within *London* and 150 miles from thence, and all his business as agent for any attorney, &c. That he (*Carpenter*) would not, after the said 25th of *December*, practise as an attorney, solicitor, or conveyancer, or as agent for any attorney, within the limits aforesaid, and that he would endeavour, by every means in his power, to influence and induce as many of his clients as he could (whose business he thereby agreed to give up and relinquish) to become the clients of *Bunn* and *Guy*. That he would, by personal application, writing circular letters, or otherwise, introduce or endeavour to introduce *Bunn* and *Guy* to the notice and favour of all such his clients; and also would permit them to practise as attornies, &c. under the stile and firm of *Carpenter*, *Bunn*, and *Guy*, for one year, and afterwards for one year more (but no longer), if *Bunn* and *Guy* should so long require to use his (*Carpenter's*) name in such firm: that he (*Carpenter*) would not claim any share in the profit to arise by such business, (except certain business mentioned for the proprietors of *Drury-lane* theatre, during the use of his (*Carpenter's*) name, he being indemnified against all losses and risks to arise therefrom; and that *Bunn* and *Guy* should carry on such business totally independent of him (*Carpenter*) in as full, ample, and beneficial a manner to all intents and purposes (except as aforesaid) as if the name of *Carpenter* were not made use of in such business. And in consideration of the premises *Bunn* and *Guy* jointly and severally agreed with *Carpenter* for the payment to him, on the said 25th of *December*, of 1000*l.*, and for effectually securing to him the further sum of 1000*l.* on the 24th of *June* 1800, with interest, &c.; and also that they would secure unto *Carpenter*, his executors, &c. an annuity of 600*l.* for seven years to commence from the said 25th of *December* 1797; and that *Bunn* and *Guy*, so long as they should use *Carpenter's* name in the firm, would indemnify him from all losses and risks that might be incurred in the course of their practice; that they would not do any act whereby *Carpenter* should become personally liable for such losses or risks, and particularly would not draw, accept, indorse, or negociate, any bill or note, or become bail or surety for any person; and that if, contrary to such agreement,

[192]

they

1803. BUNN *against* GUY. they should become or undertake to become bail, the general partnership property of *Bunn* and *Guy* should be considered as primarily liable to make good to *Carpenter* all losses incurred by reason thereof; and all the other property of *Bunn* and *Guy* should be secondarily liable to make good the same. And it was also agreed, that if *Bunn* and *Guy* [193] should make default for 21 days in payment of the said 1000*l.* on the 24th of *June* 1800, or the interest thereof, or the said annuity of 600*l.* on the days and in the manner therein mentioned, it should be lawful for *Carpenter*, by giving one month's notice, again to resume the business therein agreed to be relinquished, and to conduct the same for his own benefit, exclusive of *Bunn* and *Guy*, as if the said agreement had not been made. In pursuance of the said articles *Bunn* and *Guy*, together with two sureties, by bond, dated 6th *December* 1797, became jointly and severally bound to *Carpenter* in the penal sum of 10,400*l.* conditioned to be void on performance, &c. of the said articles. And the same parties, by another bond, dated the 27th of *December* 1797, became jointly and severally bound to *Carpenter* in a like penal sum of 10,400*l.*, with a condition to be void on payment to *Carpenter* of 1000*l.* on the 24th of *June* 1800, with interest half-yearly until paid, and also for the payment to *Carpenter* of the further sum of 4,200*l.*, by half-yearly payments of 300*l.* each, being the half-yearly payment of the said annuity of 600*l.* in the articles mentioned. A large part of the said money stipulated by the articles and bonds to be paid to *Carpenter* remaining unpaid, the question referred by the Lord Chancellor to this Court was, Whether such contract or agreement were good in law, so that *C. Carpenter* could recover such money in an action against the said *Bunn* and *Guy*?

This case was argued in the last term, when

H. Martin for the plaintiff, after stating the question to be, Whether this were a legal debt? [because if it were, being among the specialty debts, it would acquire a priority in the [194] marshalling of assets] contended, that the contract itself was void for want of any or a legal consideration. Three things were to be performed by *Carpenter*; 1. The sale and relinquishment to *Bunn* and *Guy* of his business as an attorney, &c. 2. The permission to *Bunn* and *Guy* to use his name in their business. 3. The recommendation of them to his clients. But the

1803.

BUNN *against* GUY.

contract being entire in its nature, if any of those stipulations be illegal or void, it avoids the whole. 1st, The agreement to assign a business of this nature is not a sufficient consideration to raise an assumpsit in law. It is not like an agreement to assign the trade or good-will, as it is called, of a shop; for that is an ideal value annexed to the place: but the good-will of an attorney's business cannot be annexed to his chambers, but is personal, depending upon his character for integrity and skill in his profession: this, in its nature, is incapable of being transferred, and therefore an agreement to transfer it for a valuable consideration is nudum pactum. [Lord *Ellenborough* C. J. A consideration of loss or inconvenience sustained by one party at the request of another is as good a consideration in law for a promise by such other as a consideration of profit or convenience to himself. Therefore I cannot think that you will succeed on the ground that this is nudum pactum.] Then, 2dly, the permission by *Carpenter* to *Bunn* and *Guy* to use his name in their business of attornies and solicitors avoids the contract, as contrary to the principles of public policy. This rule has been long established in equity; and, as was said by Ld. C. J. *Wilmot* in *Collins* v. *Blantern* (a), a contract "to do that which is injurious to the community is void by the common law." There are many cases (b) in equity of marriage brocage bonds, which were determined to be void on the same [195] principle; and these are now holden bad at law. Those cases have not merely turned on the ground that any real imposition or fraud had been practised on the party, but because the practice itself was injurious to the public. [Lord *Ellenborough* C. J. It will hardly be disputed with you that if there be any thing contrary to the policy of the law in this contract, it will avoid it: but shew that that is the case here.] Great public inconvenience must arise from such contracts. A permission to another to use an attorney's name in business is contrary to his duty as an officer of the Court. It is a personal trust reposed in him on the credit of his good character and ability, to secure which many regulations have been made. The rules of law in pleading, and the regulations of practice in a variety of instances, require the name of the party's attorney to be set forth, and the necessary control of the Courts over their practitioners requires that it should be so: but this contract is cal-

(a) 2 *Wils.* 350. (b) Vide 15 *Vin. Abr.* 264, &c.

1803.

BUNN *against* GUY.

culated to evade that duty and responsibility. [Lord *Ellenborough* C. J. Observe that this is only a permission to practise under *the firm of Carpenter Bunn* and *Guy*: it is not an authority to *Bunn* and *Guy* to use *Carpenter*'s name as an attorney *in court*. A party could not plead in the name of *the firm*.] 3dly, The agreement by *Carpenter* to recommend his clients to *B.* and *G.* is contrary to morality; and therefore the law will not raise an assumpsit on such a consideration. In *Morris* v. *M'Cullock* (a), Lord *Henley* C. held that a contract to give a premium for a man's interest to procure another an office of trust or service under Government was a contract of turpitude, and void. Nothing turned there upon the distinction between an *office* and a bare *trust*. The same principle extends equally [196] to avoid a pecuniary contract for recommending another to a situation of trust, especially one wherein the public have a deep concern. It is immoral and illegal in its very nature; because it can only be performed by a fraud upon the person on whom such recommendation is to operate. The representation to be made in such a case must be a false one: or at least there is a temptation to represent falsely for the sake of the reward. That principle governed *Blachford* v. *Preston* (b), where a sale, by the owner, of the command of a ship employed in the *East India* Company's service was deemed illegal, and no foundation for an action. It is true that such a sale was also in contravention of the by-laws of the Company; but the Court decided on a broader ground, that no action could arise out of a contract in fraud and prejudice of third persons. [Lord *Ellenborough* C. J. Must it not be understood that the recommendation was to be made upon the assumption that *Bunn* and *Guy* continued worthy of it? and if they had not, would it not have absolved *Carpenter* from his undertaking to recommend them?] The stipulation is positive, without any such reserve, and the temptation to deceive is nearly as strong.

Marryat contrà. If the possibility of an abuse arising out of a contract were sufficient to avoid it at common law, it would not have been necessary, as it was thought to be, for the legislature to interfere by express prohibition in several instances; such as wager policies, stock bargains, &c. It would have been sufficient to have shewn that such contracts were from their nature open to those abuses against which the particular provisions were levelled. [197] It is enough that there is no vice or impolicy in the particular

(a) *Ambl.* 434.

(b) 8 *Term Rep.* 89.

contract

1803.

BUNN *against* GUY.

contract in question; no stipulation to defraud or prejudice any third person; nothing in contravention of the common or statute law; nothing which goes to infringe the rules of Courts; no assumptio falsi or suppressio veri bargained for. There is no ground on which to distinguish this from the common case of contracts for the sale of the good-will of a trade, which, in common experience, are enforced by actions at law at every Sittings. The very term *good-will* imports that the purchaser is to have the recommendation of the seller to his customers. And in *Crespigny* v. *Wittenoom* (a), a proctor's resigning his situation and business in *Doctors Commons* in favour of another was expressly considered as a good consideration for the grant of an annuity. [*Lawrence* J. The point there immediately under the consideration of the Court was, whether such a contract were within the annuity act? No question was made on the other ground.] The giving up of a man's trade is recognized as a legal consideration for a promise in *Mitchell* v. *Reynolds* (b); as a contract in restraint of trade in a particular place, or for a certain time, has also been holden (c) binding if upon good consideration. And though trade in general may not be so important a concern as the duty of an attorney, yet the principle of all these cases is alike. It might have been different if there were a stipulation here for any undue or fraudulent representation or practice. But it does not appear that he was not to assist them. In some instances he was to participate in the profits. [Lord *Ellenborough* C. J. It is stipulated in general that *B.* and *G.* were to carry on the business independent of *Carpenter.*] Upon the [198] same ground the continuance of the name of *Child* in the banking-house so called, may be said to be a fraud upon the public; no such person being in the firm. While *Carpenter's* name was continued in the firm, and gave credit to it, the law would attach responsibility on him with respect to third persons dealing on the credit of it. He would be liable for palpable neglect or mismanagement in the business of those whom he held out to the world as his partners; as in the case of traders; and therefore the public could not be injured. All trades and business require, to a certain extent, a peculiar skill, to which those

(a) 4 *Term Rep.* 790. (b) 1 *P. Wms.* 181. 191.

(c) Vide *Colmer* v. *Clarke*, 7 *Mod.* 230. and *Davis* v. *Mason*, 5 *Term Rep.* 118.

1803.

BUNN *against* GUY.

who deal with the parties look; and therefore the objection, if well founded, applies in principle to all cases of this sort. This is not a purchase of an *office;* for *Bunn* and *Guy* were in possession of their official character before, and, consequently, must have submitted to the ordinary examination of other attornies, and been approved of by those appointed to judge of them, by st. 2 *Geo.* 2. *c.* 23. *s.* 2. The 10th section of the act even enables one attorney to prosecute any suit in the name of another with his consent in writing. The same objection may be extended to the case of partnerships among attornies; where it is not unfrequent to stipulate with each other for the performance of certain parts of the business. The duty of a schoolmaster is at least as much of a personal nature as that of an attorney; and yet an agreement by one schoolmaster to resign his situation in favour of another was reckoned a good consideration for an annuity, in *Hutton* v. *Lewis* (*a*). That also was a case upon the annuity act; but if the consideration were immoral or illegal it would not have sustained the grant. If the possibility of recommending an unfit person to the performance
[199] of a duty were an objection to a contract for the purchase of such recommendation, it might be as well urged to invalidate the sale of an advowson. The only cases where agreements of this nature have been deemed invalid have been where they related to the appointment of *officers;* which turn on the stat. 5 & 6 *Ed.* 6. *c.* 16. Such as *Parsons* v. *Thompson* (*b*), and *Garforth* v. *Fearon* (*c*). The case of *Blachford* v. *Preston* (*d*), was of the same sort; being a contract for the sale of an appointment under the *East India* Company, which was in the nature of an office: and that case also turned principally on such sale being an infringement of the by-laws of the Company, which are authorized by act of parliament, and are of importance so great as to affect the interest of the public at large. He also referred to the distinction taken in *Layng* v. *Paine* (*e*) between covenants or conditions void by *statute*, and at *common law;* in the former case, if one of such covenants, &c. be void, the contract is void in toto; in the latter, only the illegal covenant.

H. Martin in reply, observed that the argument drawn from

(*a*) 5 *Term Rep.* 639.
(*b*) 1 *H. Blac.* 322.
(*c*) *Ib.* 327.
(*d*) 8 *Term Rep.* 89.
(*e*) *Willes*, 574. and vide *ib.* note (*b*) by the Editor, and *Chesman* v. *Rainby*, 2 *Ld. Ray.* 1459.

the

1803.

BUNN *against* GUY.

the interference of the Legislature to provide a particular remedy in particular cases might equally be urged to prove that no contract against public policy could be set aside at common law. That this contract was immoral, because founded on a falsehood; for thereby *Carpenter* agrees to hold himself out to the world as a partner with *B.* and *G.* to recommend them to business, while he privately stipulates with them that he will not interfere in the management of the business. But if the agreement were to be considered as no more than a mere *recom-* [200] *mendation*, so long as they deserved it; that has never yet been holden to be a sufficient consideration to raise an assumpsit. [*Lawrence* J. The question here arises upon a *deed*; and can we enter into the question of what would be a sufficient consideration to raise an *assumpsit*, on the construction of a *deed*? *Le Blanc* J. A deed is open to the objection of being founded on a bad consideration: but I doubt whether it is open to the objection of want of a good consideration.] He then observed, that the cases of *Parsons* v. *Thompson* (*a*), and *Garforth* v. *Fearon* (*b*), were actions of assumpsit, and not on the stat. 5 & 6 *Ed.* 6., and referred to *Haneington* v. *Du Chatel* (*c*) where Lord *Thurlow* C. granted a perpetual injunction against suing upon a bond for the purchase of an office, though not within the statute, merely on the ground of such a contract being against public policy.

The Court said, they would consider the case, and certify their opinion. And in this term the following certificate was sent to the Lord Chancellor:

This case has been argued before us by counsel: we have considered it, and are of opinion that the contract or agreement of the 6th of *December* 1797, stated in the above case, is good in law; so that the said *Charles Carpenter* could recover the money therein mentioned in an action against the said *John Bunn* and *John Guy*.

ELLENBOROUGH.
7th *November* 1803. N. GROSE.
S. LAWRENCE.
S. LE BLANC.

(*a*) 1 *H. Blac.* 322. (*b*) *Ib.* 327. (*c*) 1 *Bro. Ch. Cas.* 125.

1803.

Thursday, Nov. 10th.

SHAW and Another, Assignees of HILL, a Bankrupt, *against* JAKEMAN.

A trader, before marriage, agrees by parol to settle all his stock on his intended wife; which stock, it appeared afterwards, amounted then to 450*l.* 3 per cents, but in the marriage articles it was stated to be 340*l.* stock; and the deed executed after marriage settled the same sum: this mistake (proved and accounted for by the witness who prepared the deed, and by the bankrupt, to have originated from the latter giving the sum of 340*l.* as the *value* of the stock *in money* at that time, and the other setting it down as the amount of the *stock itself*) was admitted and agreed by the bankrupt, after his bankruptcy and absconding, to be rectified by the alteration of the sum as it stood in the articles and the deed from 340*l.* stock to 450*l.* stock; which was accordingly done, and the instrument re-executed, with the consent of the bankrupt and his wife, and the trustees: and the whole stock having been sold out by the bankrupt *before* his bankruptcy, and the amount paid into the hands of the trustees before such alteration, who after the bankruptcy purchased other stock with the money: held that, however such an alteration might avoid the instruments if done with the consent of the parties interested; yet, inasmuch as one of the parties, the feme covert (to whom no fraud was imputed), was incapable, by such consent, of exonerating the trustees from the performance of the trust; but equity would probably set up again the destroyed instruments in her favour; the trustees, who had received such money under the instruments when they existed in a valid form, held the same subject to the purpose of the trust, and not for the benefit of the bankrupt's estate; and that the assignees could not recover in assumpsit from the trustees the value of the stock originally included in the marriage articles and deed, but only the surplus: and such surplus they were entitled to recover at law; the agreement for the settlement of the *whole* stock not being *evidenced by writing before marriage* within the statute of frauds; but being the subject of equitable jurisdiction only, under the circumstances.

THIS was an action of assumpsit for money had and received by the defendant, in one count, to the use of the bankrupt, and in another, to the use of the assignees. At the trial before Lord *Ellenborough* C. J. at the sittings after last *Easter* term at *Westminster*, the facts appeared to be, that *Hill* before his bankruptcy, being about to marry *Jakeman's* daughter, the defendant refused his assent unless *Hill* would settle *all* his stock upon her; and accordingly, by a written agreement made on the 3d of *August* 1802, between *Hill* and *Jakeman*, the defendant, which recited the intended marriage, it was stipulated that the sum of 340*l.* 3 per cents, then standing in *Hill's* name, should be sold out or transferred to trustees for the use of *Sarah Jakeman*, (the defendant's daughter,) and the maintenance of any child or children of the marriage. And it was further agreed that a regular deed of trust for that purpose should be prepared and executed, and that the defendant and one *J. F.* should be the trustees. This * was signed by *Hill* and the defendant, and witnessed by two witnesses, one of whom, *Fletcher*, prepared the instrument. The marriage took place on the 22d of *August* 1802, and a regular deed of trust was afterwards executed on the 29th of *November* between the same parties and the trustees, in pursuance of the articles, under the circumstances after mentioned. Upon the produc-

1803.

SHAW *against* JAKEMAN.

tion of the articles and the deed at the trial, they appeared to have been altered from the form in which they were originally drawn, by the substitution of 450*l.* 3 per cents, as the sum settled, instead of 340*l.* 3 per cents; and there was a further alteration in the deed by the insertion of a recital of the articles, which had been originally omitted; and these alterations were proved to have been made about a week after the said 29th of *November*, when both the articles and the deed were re-executed with the consent of all the same parties and trustees, and in the presence of them and of the subscribing witnesses. And the occasion of this alteration was stated to be, that a mistake had been made in the sum mentioned in the articles and in the deed as the amount of the settled stock, namely in stating it at 340*l.* three per cents, instead of 450*l.* three per cents, (which was proved to be the real amount of the stock possessed by *Hill* at the time before his marriage); which mistake *Fletcher* the subscribing witness upon his examination explained to have arisen in consequence of *Hill* having, when the agreement was preparing, given in the real sterling value of the stock, which at that time was 340*l.* instead of the gross nominal value of it as stock which was 450*l.*, which 340*l.* so mentioned by *Hill* at the time was supposed by the witness who prepared the agreement to be the amount *in stock* and not *in money*, as *Hill* had computed it. And this was fully explained to the parties when the alteration was made. On the 19th of *November* 1802 *Hill* sold out the whole stock, and paid the amount to the defendant *Jakeman* as a trustee, who therewith purchased other stock on the 2d of *December* following. On the said 29th of *November*, the day on which the deed of settlement was executed, and immediately after such execution, *Hill* committed an act of bankruptcy by absconding. A verdict was found for the plaintiff for 304*l.* 17*s.*, subject to the opinion of the Court on two objections taken at the trial; 1st, that by the alteration in the articles and in the deed they were rendered void: or, 2dly, that if the parties, circumstanced as they then were, were authorized to make such alteration; yet it operated as a new agreement, and therefore the instruments were not available in evidence without being re-stamped. A rule was obtained in the last term, calling upon the plaintiffs to shew cause why the verdict should not be set aside, and a new trial had. [203]

Gibbs and *Marryat* now shewed cause. 1st, The deed executed

1803.

SHAW *against* JAKEMAN.

ecuted by *Hill* after his marriage cannot be good as against creditors (*a*), unless warranted by the articles before marriage. But the deed as it now stands is different from the articles in the form in which they existed before the marriage; and by the alteration which has been made in both the instruments they are absolutely avoided, and not merely null for the excess of the sum beyond what was originally inserted in them: according to the doctrine in *Master* v. *Miller* (*b*), where an alteration in the date of a bill of exchange which accelerated the day of payment was holden to avoid the instrument in toto. For
[204] otherwise, as was there justly observed by Lord *Kenyon*, persons would take the chance of committing a fraud, if it might be done without incurring any risk though detected. If it be said that such alteration may be made, provided all the parties interested consent; the answer is, that at the time when the alteration was made, the creditors of the bankrupt were parties interested, and they did not consent. The alteration was made by *Hill* in contemplation of the act of bankruptcy with which it was immediately accompanied, and his property at that time afterwards vested by relation in his assignees. But, 2dly, Supposing that these parties had a right to make the alteration, yet the effect of the alteration being to make a new agreement, there ought to have been a new stamp. 3dly, At all events the plaintiffs must be entitled to a verdict for the difference between the 340*l.* stock as originally settled, and the 450*l.* stock settled by the instruments when altered; for supposing that the assignees would be bound in equity as far as the bankrupt himself was; yet by the statute of frauds (*c*) "no action shall be brought on any agreement made upon consideration of marriage, unless there be some memorandum thereof in writing, and signed by the party to be charged." Now here the bankrupt had only bound himself in writing before his bankruptcy to the extent of the 340*l.* stock: beyond that, his obligation was only by a parol contract, which was not obligatory by the statute.

Erskine and *Garrow* contrà. The trustee who has received the whole of the trust-money stands before the court, not as a
[205] plaintiff attempting to recover upon the strength of the deed which must be taken to have been altered subsequent to the

(*a*) Vide 1 *Jac.* 1. c. 15. *s.* 5. and *Walker* v. *Burrows*, 1 *Atk.* 93.
(*b*) 4 *Term Rep.* 320. (*c*) 29 *Car.* 2. c. 3. *s.* 4.

bankruptcy, but as a defendant in an equitable action brought by the assignees of the bankrupt who take his estate subject to all his equities: and if *Hill* continuing solvent could not have taken advantage of the mistake, and have recovered this money from the trustee to whom he had paid it over pursuant to the original contract, neither can the assignees recover it. This case differs materially from *Master* v. *Miller* (a), where the alteration of the date of the bill of exchange, which accelerated the payment, was intended to operate fraudulently; whereas this alteration was merely to set right a mistake, and to make the instrument speak the truth.

Cur. adv. vult.

Lord ELLENBOROUGH C. J. now delivered the judgment of the Court.

The question is, Whether in this action for money had and received, which is founded upon all the equitable circumstances of the case between the parties, the defendant is bound to pay over to the assignees of *Hill* money which he received from *Hill* before his bankruptcy, upon a special trust, and for an express purpose, affecting the right of a third person, viz. the wife of *Hill*, and to which the defendant has accordingly applied it since *Hill's* bankruptcy? It appears by the evidence of *Hill*, that having sold out the stock, 450*l*., he received the produce and delivered it to *Jakeman*, for the express purpose of being invested on the trusts of his marriage. Those trusts, at the time of paying the money to *Jakeman*, had an existence, and were evidenced by articles in writing, of the 3d of *August* preceding. No destruction of that instrument, nor any alteration, having in point of law the effect [206 of such destruction, (if it ever so clearly had such effect within the authority of *Master* v. *Miller* (b), or any other cases,) could, without the consent of the objects of the trusts, (and *Hill's* wife, a married woman, was incapable of giving such consent,) discharge *Jakeman* the trustee, and exonerate him from the equitable obligation of performing that trust. The destroyed instrument might, and most probably would by a court of equity be restored and set up again, as deeds destroyed by fraud or accident are in many cases by the autho-

(a) 4 *Term Rep.* 320. (b) 4 *Term Rep.* 320.

ritv

1803.

SHAW *against* JAKEMAN.

rity of that Court in favour of the proper objects of the protection of the law; and surely the wife in this case is such an object: and unless we saw clearly that could not be the case, we should do wrong in taking the fund, in respect of which and for which he might be so made liable, out of the hands of the trustee. This seems not to be a case within the statute of frauds; for the agreement existed in a valid form when the defendant received the money; and at the time of the bankruptcy he had it, subject to the trusts of the marriage settlement, and not as the property of *Hill*, which vested in the assignees to be applied to the payment of his creditors: their interest could only be what *Hill's* was; and *Hill* was not entitled to the money, but only to such interest as the marriage settlement gave him in the money when converted into stock. In *Tyrrell* v. *Hope* (*a*), the Master of the Rolls, in a case where a man had previous to his marriage agreed that an estate, to which his wife was entitled on her mother's death, should be settled to her separate use, held that she should have [207] the same relief against her husband's assignees, as she would have been entitled to against him, and that the assignees must be considered as trustees for the wife in the same way the husband was. Perhaps even a parol agreement, followed by marriage and payment of the money to the defendant, the trustee, would be such part execution as to prevent the assignees claiming it, even if there had not been at any time a written agreement; for Lord *Thurlow* held, in *Dundass* v. *Dutens* (*b*), that a settlement of a wife's property *after* marriage, in pursuance of a parol agreement, was good against the husband's creditors. But it will be said that, admitting all this, still he should only be allowed to retain the value of the 350*l.* stock which was covered by that agreement: and indeed, as there is no evidence, even by parol, of any agreement prior to the marriage having been made for settling the whole sum, although it might be, and probably it was, his own intention so to do, it would be too much to give effect to a purpose originating with the bankrupt, and not communicated to the intended wife or her relations before the marriage, but, as far as appears, first begun to be carried into effect on the eve of his bankruptcy; and not carried into effect by the trustee till after

(*a*) 2 *Atk.* 558. (*b*) 1 *Ves. Jun.* 196.

the

1803.

SHAW *against* JAKEMAN.

the bankruptcy. In such a case, if the defendant have any claim to be allowed more of money placed in his hands than would satisfy the then existing obligations and duties of *Hill*, the person making such deposit, he must apply to a court of equity for the purpose of giving effect to such claim to the extent of the trust marked out by the agreement destroyed, (if it were so,) to the prejudice of a party who could not consent to its destruction, nor was competent to wave the benefits thereby secured to her. We think ourselves warranted in considering the trust agreement as available, and the trustee entitled to retain in satisfaction thereof; entitled to retain so far, but no further; leaving the defendant, of course, to such ulterior relief, if any, as he may obtain elsewhere. The verdict therefore must be reduced by so much as amounts to the value of the purchase-money of 350*l.* stock, at the time when the re-purchase took place; but if that be not consented to there must be a new trial. [208]

Verdict to be entered for the Plaintiffs for the Difference.

The KING *against* NOTTINGHAM.

Thursday, Nov. 10th.

The 12th sect. of the stat. 38 *Geo.* 3. *c.* 52. providing that no indictment shall be removed into the next adjoining county, *except the person applying for such removal* shall enter into a recognizance in 40*l.* for the extra costs, &c. does not relate to indictments sent by *B. R.* to be tried in the next adjoining county after a removal thither by certiorari.

AN indictment for a common assault, found by a grand jury of the county of the city of *Lincoln*, after having been removed into this court by certiorari at the instance of the prosecutor, and not guilty pleaded, was by a rule of court at the same instance sent down to be tried in the county at large, the prosecutor not having entered into a recognizance in 40*l.* prior to such removal of the record into the adjacent county.

The stat. 38 *Geo.* 3. *c.* 52. *s.* 1. enacts, that " in every " indictment removed into *B. R.* by certiorari, and in every " information filed by the Attorney-General, &c., if the venue " be laid in the county of any city or town corporate, it shall " and may be lawful for the Court in which such indictment, " &c. shall be depending, at the instance of the prosecutor or " of any defendant, to direct the issue joined, &c. to be tried " by

1803. "by a jury of the county next adjoining to the county of such "city," &c. Then *s.* 3. enacts, "That if it shall appear "to any Court of oyer and terminer or general gaol delivery "for the county of any city or town corporate that any in-"*dictment found by any grand jury of the county of such "city, &c. is proper to be tried by a jury of any next adjoining "county, it shall and may be lawful for the said Court of "oyer and terminer, &c. at the prayer of any defendant, to "order such indictment and the several recognizances, &c. to "be filed with the proper officer, to be by him kept among the "records of the courts of oyer and terminer, &c. for such next "adjoining county, and to cause the defendant in such indict-"ment to be removed by habeas corpus to the gaol of such "next adjoining county, &c. and to cause the prosecutors "and witnesses against such defendant to enter into recogni-"zances to prosecute, &c. at the sessions of oyer and terminer, "&c. for such next adjoining county." Then, after other regulations, the 12th section provides, "that nothing in the act con-"tained shall extend to enable any person to prefer any bill of in-"dictment for any offence committed within the county of any "city, &c. to the jury of such next adjoining county as "aforesaid, *or to remove any indictment, &c. except the person* "preferring such bill, or *applying for such removal, shall enter* "*into a recognizance before the Court where such bill shall be* "*preferred, or the Court or magistrate to whom such applica-*"*tion shall be made*, in 40*l.*, conditioned to pay the extra costs "attending the prosecuting for such offence in such next ad-"joining county, provided the Court before whom the trial is "had shall be of opinion that he ought to pay the same."

The King *against* Nottingham.

*[209]

After a verdict of guilty at the last asssizes for the county of *Lincoln*,

Reader moved to quash the rule of Court directing the removal and trial of this indictment in the county of *Lincoln*,

[210] suggesting that the 12th section, which was conceived in general terms, was meant to include all cases of removal of an indictment for trial into the county at large from the county of the city, &c. within the same; and to make it a condition precedent for the party applying for such removal, or preferring the indictment in the first instance in such foreign county, to enter into a recognizance in 40*l.* conditioned to pay the extra costs of the trial in such county if the Court should think fit. The obvious

1803.

The KING *against* NOTTINGHAM.

vious reason of which was for the purpose of preventing parties from being wantonly harassed by the extra expences of such removals; a reason which applies as well to a trial after a removal of the record by certiorari, as in the first instance by application to the Court of oyer and terminer within whose jurisdiction the indictment originated.

LAWRENCE J. intimated great doubt whether the 12th section applied to cases, within the first section of the act, like the present, where the indictment had been first removed into this Court by certiorari, and afterwards directed by it to be tried in the next adjoining county to that in which the bill had been found: for he observed that nothing was said in that clause concerning any *removal* of the indictment into another county by a party, which was provided for by the 3d section enabling the courts of oyer and terminer and gaol delivery, at the prayer of any defendant, to remove the indictment and trial into the next adjoining county.

Lord ELLENBOROUGH C. J. said, that if the 12th section applied to the case of a record first removed into this Court by certiorari, it would abridge the power which this Court had before the act of directing an indictment to be tried in the next adjoining county in cases where justice required it. [211]

The Court however referred to the statute, and, after some consideration of the several clauses,

Lord ELLENBOROUGH C. J. said, we are all satisfied that the 12th clause, requiring the recognizance of 40*l*. to be entered into upon the change of venue, does not relate to cases where the indictment has been previously removed into this Court by certiorari, but that part of it which relates to the party *applying for such removal* refers to removals by the authority of commissioners of oyer and terminer and gaol delivery; and this record not having been removed by such authority, the recognizance was not necessary.

Per Curiam, Rule refused.

1803.

Friday, Nov. 11th.

Coxe and Others *against* Harden and Others.

The consignor of goods abroad upon receipt of orders from a correspondent here, ships goods on account and at the risk of the consignee, and takes bills of lading from the captain making the goods deliverable to the consignor's own order, and transmits one of such bills *unindorsed* with the invoice to the consignee, inclosed in a letter informing him that he had drawn upon him for the amount, which he doubted not would meet due honour and close the account; and the consignor, by way of precaution, also sent another bill of lading *indorsed* to his own agent. Held that upon the shipment on account and at the risk of the consignee the property in the goods vested in him, subject only to be devested by the consignor's stopping them while in transitu; and that upon the arrival of the goods, the consignee having obtained possession of them from the captain by the production of his *unindorsed* bill of lading, the property became absolute in the consignee, however wrongfully parted with by the captain without a competent authority from the shipper, and however answerable the captain might be to the shipper on that account.—*Qu.* Whether the mere indorsement of a bill of lading to an agent to enable him to receive the goods on account of his principal, *without any consideration*, will enable such agent to maintain trover in his own name for the goods? Semble not.

IN trover to recover the value of 18 mats of flax, at the trial before Lord *Ellenborough* C. J. at the sittings at *Guildhall* after last *Easter* term, a verdict was found for * the plaintiffs for 266*l*. 7*s*., subject to the opinion of the Court upon the following case:

In *February* 1802 the flax in question was, by order of *Oddy* and Co. of *London*, purchased by *Browne* and Co. of *Rotterdam*, and shipped by them from thence for *Oddy* and Co. on board the *Vrow Jannetje*, a general ship, for *London*. On the 12th of *February* 1802 *Browne* and Co. sent the following letter to *Oddy* and Co., inclosing an invoice and a bill of lading to the order of *Browne* and Co. the shippers, but which was not indorsed: "Having none of your esteemed favours, we "have the pleasure of handing you a bill of lading and in-"voice of the remainder of the flax we purchased for your "account by order of Mr. *Oddy*, consisting of 18 mats, which "are shipped by the *Vrow Jannetje*, *Jacob Purlevhet*, master, "for your place; the amount being *f*. 3376 : 10. at exch. "35/6. 317*l*. 0*s*. 10*d*. We have this day drawn on you at "two usance, in favour of *S. E. Lacon*, *Fisher* and Co., not "doubting it will meet due honour. We close this account "in course." For the amount of the 18 mats of flax *Browne* and Co. drew a bill upon *Oddy* and Co., which, owing to embarrassment in their circumstances, they did not accept. *Oddy* and Co. became bankrupts on the 23d of *February* 1802, and a few days before delivered the aforesaid bill of lading, *without indorsement*, to the defendants, on account of a debt antecedently due to them from *Oddy* and Co. The ship and flax on the 29th of *February* 1802 arrived at *London*, and the

[*212] defendants

defendants having paid the freight and duties obtained possession of the flax by means of the unindorsed bill of lading, entered it at the custom-house, and landed and housed it on the 4th of *March* following. The said flax was in *April* 1802 sold by the brokers of the defendants, and an account of sales [213] thereof (dated 6th of *April* 1802) was rendered by the defendants to *Oddy* and Co., " the net proceeds" whereof (amounting to 266*l.* 7*s.*) were stated at the foot of the account to be " carried *for the present* to the credit of Messrs. *Oddy* and Co., though now under litigation." The captain of the *Vrow Jannetje* signed three bills of lading for the said flax, all to the order of *Browne* and Co. the shippers, who transmitted one of the bills of lading to the plaintiffs *with an indorsement upon it*, making the contents deliverable to them, *for the purpose of securing the amount of their said bill upon* Oddy *and Co.* The plaintiffs, on the 6th of *March*, whilst the flax remained in the warehouses and unsold, and also before the commencement of this action, demanded it under the last-mentioned indorsed bill of lading from the defendants, and forbid the sale of it; but the defendants refused to deliver, and afterwards sold it. No tender of money in respect of the freight or other charges paid by the defendants was made to them. The question for the opinion of the Court was, Whether under the circumstances above stated the plaintiffs were entitled to recover or not? If the Court should be of opinion that they were, the verdict was to stand; if not, a nonsuit to be entered.

Giles for the plaintiffs. The bill of lading transmitted by *Browne* and Co. to *Oddy* and Co., directing the delivery of the goods to be made *to the order of* Browne *and Co.*, not having been *indorsed* by them, gave no authority to the holder to demand the goods of the captain, and therefore the defendants obtained possession of them wrongfully in the first instance, and were at all events guilty of a conversion by selling them after notice that they were the property of others. The bill of lading being in this form, the property in the goods, which [214] was originally in *Browne* and Co., the shippers, could only pass out of them by indorsement. Since the case of *Lickbarrow* v. *Mason* (a) a bill of lading of goods at sea is to this

(a) 2 *Term Rep.* 63. and 5 vol. 367 & 683.

1803.

COXE *against* HARDEN.

and most other purposes like a bill of exchange. The captain cannot make a good defence to an action by the shippers for want of such indorsement: and this action is to be considered as brought by them, under whom the plaintiffs claim by means of another bill of lading regularly indorsed. *Oddy* and Co. had no original title to the goods, because the transmitting the bill of lading unindorsed, together with the letter inclosing it, shewed that it was not the intention of the shippers to convey the property to them, except conditionally, in case of their acceptance of the bill drawn on them for the amount; which condition not having been complied with, the equitable as well as legal property remained in the shippers: and as *Oddy* and Co. could not have lawfully possessed themselves of the goods without accepting the accompanying bill, they could not convey any title to the defendants by handing over to them an unindorsed bill of lading, directing the delivery to be made on account of the shippers.

Marryat contrà, First, whatever may be the right of *Browne* and Co. to the goods, the plaintiffs cannot avail themselves of it in this action; for trover can only be maintained by one who has a general or special property, which in the latter case must have been accompanied with possession: whereas the plaintiffs have neither, but only a bare authority to receive, no better than that of a broker's clerk who goes to demand goods. [215] The mere indorsement of the bill of lading, even supposing that such an instrument were applicable to goods on shore, without a valuable consideration paid for them, conveyed no property to the plaintiffs: at most it only gave them authority to receive the goods for the benefit of *Browne* and Co., in whom the property remained. The case of *Lickbarrow* v. *Mason* only decided that such indorsement for a valuable consideration transferred the property of goods at sea, of which no other kind of delivery was capable of being made, and to which alone the custom of merchants was deemed to extend. But supposing *Browne* and Co. were the plaintiffs in this action, they could not have recovered; for by the shipping of the goods by the order and at the risk of *Oddy* and Co., and sending them the invoice, the property vested in them, without any words of condition annexed, scil. in case they honoured the bill; but subject only to *Browne* and Co.'s right of stopping in transitu in case of the insolvency of the vendees, or their refusal

refusal to honour the bill drawn upon them for the value; but this right could only be exercised during the transit of the goods, and when that was ended by the arrival, landing, and warehousing of the goods on the part of *Oddy* and Co., the right of the shippers ceased, and the property vested absolutely in *Oddy* and Co. or their assigns. Though in *Bohtlinck* v. *Inglis* (*a*) it was considered, that a claim by the consignees upon the captain while the goods were in transitu was equivalent to an actual stoppage of them; because the captain should not decide the property by his own wrongful act in making the delivery to the assignees of the consignees after notice from the consignors to withhold the goods. It [216] would be very inconvenient to commerce if it were established that the property of goods shipped remained in the shippers till delivery of a bill of lading indorsed; for bills of lading are seldom given in the coasting trade, and in others it often happens that they are sent unindorsed; and the entries at the custom-house, which are required to be made within a given time under penalty of confiscation, must be made by persons properly authorised.

Giles in reply said, that the indorsement of the bill of lading transferred by a consequence of law the legal property in the goods to the plaintiffs, whatever might be the intention of the parties; and therefore it was not like a power of attorney which only enables the attorney to sue in the name of his principal: and the only effect of the want of a valuable consideration paid by the plaintiffs is, that they stand in the same situation as *Oddy* and Co. would have done; in which view of the case the time of making such indorsement cannot vary the question; though certainly a bill of lading operates after the landing of the goods. [*Le Blanc* J. It does not appear in the case when the bill of lading was indorsed to the plaintiffs; therefore we cannot take notice of that fact.] Then as between *Browne* and Co. and *Oddy* and Co., the property never passed from the first to the last-mentioned. No consideration was ever paid by *Oddy* and Co., and the legal title never passed from the shippers who shipped on their own account, as appears by the express words of the bill of lading.

(*a*) 3 *East*, 381.

1803.

COXE *against* HARDEN.

*[217]

Lord ELLENBOROUGH C. J. If it were necessary to decide whether or not the plaintiffs could maintain this action, supposing the property not to have passed to *Oddy* and Co., I should think that they could not; for no decision of a court of law upon the subject of bills of lading has gone further than to say, that the assignment of a bill of lading by the consignees for a valuable consideration, and without notice by the party taking it for a better title, passes the property in the goods thereby consigned. But no consideration having been paid by the plaintiffs in this case for such assignment, they took the bill of lading merely as agents for *Browne* and Co., and without any property in themselves in the goods. The analogy between bills of lading and bills of exchange has been pushed in the argument beyond all warrant of authority; but I agree to the extent of the doctrine in the case of *Lickbarrow* v. *Mason*, that an indorsement of a bill of lading for a valuable consideration, and without notice by the indorsee of a better title, passes the property. But supposing the plaintiffs to stand in the situation of *Browne* and Co., they would still not be entitled to recover. The goods were originally purchased for *Oddy* and Co., by their orders, and shipped for their use and at their risk; they were therefore entitled to the possession of them as soon as they arrived, the shippers not having stopped them in transitu: and the only thing which stood between *Oddy* and Co. and such possession was the circumstance of the captain's having signed bills of lading in such terms as did not entitle them to call upon him for a delivery under their bill of lading. But that difficulty has been removed; for the captain has actually delivered the goods to their assigns. Whether in consequence of that *Browne* and Co. may maintain an action against the captain is another question: but it is enough to say that the delivery has been made, that is, made to those to whom

[218]

and for whose use the goods were sent, and at whose risk they were without doubt while in transitu, and in whom the property therefore was, subject only to a sort of jus postliminii, the right in the shippers of stopping them in transitu: but here that right was not attempted to be exercised till after the goods were arrived and delivered into the hands of the persons for whom they were destined, when it was too late. I observe indeed at the foot of the account of sales, that the net proceeds are only stated to be carried provisionally to the credit of *Oddy* and Co.; but that is sufficiently explained by what follows,

1803. Coxe against Harden.

lows, because the property was under litigation. But that cannot affect the question of right as between *Browne* and Co. and *Oddy* and Co., to which latter the possession of the defendants can alone be referred. Then the goods which were shipped by the orders and at the risk of *Oddy* and Co. became their property, subject only to the shippers' right of stoppage while in transitu, which right not having been exercised during that period, the goods on delivery became the indefeasible property of *Oddy* and Co., and they were entitled to transfer their right in them to the defendants.

Grose J. As to the question touching the property in the goods, it is clearly in the defendants. They were originally ordered to be shipped by *Oddy* and Co. under whom the defendants claim; they were accordingly shipped on account of *Oddy* and Co. and at their risk; that vested the property in them by law, subject only to be devested by the shippers stopping the goods in transitu. Then has the property been so devested? We only find that the shippers transmitted a bill of lading indorsed to the plaintiffs, to authorise them to receive the goods from the captain. When that indorsement was [219] made does not appear in the case; it might have been after the goods got to the hands of the defendants. At any rate it came too late after actual delivery to the vendees. Besides, to entitle these plaintiffs to sue, it should appear that the bill of lading was indorsed to them for a valuable consideration. Nothing therefore is shewn to devest the property which originally vested in *Oddy* and Co. upon the shipment of the goods. After such shipment they might have insured the goods as their property, and would have been entitled to recover the value if lost. And without insurance the loss, if any, in the course of the voyage must have been borne by them.

Lawrence J. It is not necessary to decide the first point, relative to the want of title in the plaintiffs to maintain trover; but it seems to me that the plaintiffs' counsel has attempted to carry the effect of the indorsement of a bill of lading much farther than it has hitherto gone. The indorsement of the bill of lading to the plaintiffs in this case was more than *Browne* and Co. giving an authority to the captain to deliver the flax to the person to whom such indorsement directed the delivery

 to

1803.

COXE *against* HARDEN.

to be made. The object in making it was only to enable the plaintiffs to take possession of the flax on account of the shippers, as a matter of precaution in case of the insolvency of *Oddy* and Co.: the shippers trusting that the captain would not deliver the goods without a proper authority. There was certainly no intention on their part to transfer the property to the plaintiffs. But supposing that were otherwise, still the plaintiffs would not be entitled to recover. Upon the shipment of the goods on account and at the risk of *Oddy* and Co. the pro-
[220] perty became vested in them, and so it continued from that time, subject only to the consignors' right of stopping it in transitu. That is so clear that no authority is wanted to establish it. Then the right of stopping them not having been exercised while the goods were in transitu, when *Oddy* and Co. got possession of them they had a right to transfer them to the defendants.

LE BLANC J. The only difficulty in the argument arises from taking into consideration the case as between the captain and the shippers, and applying it to the question between the latter and the consignees. The captain, indeed, undertook by the bills of lading which he signed to deliver the goods only to the order of the shippers, and he may be liable to answer to them for the breach of that contract. But the question is different as between these parties: for supposing that the plaintiffs got the legal property from *Browne* and Co. by the bare indorsement of the bill of lading, which I much doubt; yet it appears that the goods had been ordered by *Oddy* and Co., and were shipped on their account and at their risk, by *Browne* and Co. Then, upon such shipment, without any bill of lading, they became the property of *Oddy* and Co., subject only to the right of *Browne* and Co. to stop them in transitu. Then, whether the plaintiffs be the agents of *Browne* and Co., or have a property themselves in the goods transferred to them by the shippers, yet as they could only exercise the right of stoppage while the goods were in transitu, when once they were in the possession of *Oddy* and Co., or of those who had authority from them to receive them, (whether received rightfully or wrongfully from the captain) the right of stoppage ceased, and the pro-
[221] perty became indefeasibly vested in *Oddy* and Co., without any further control of the shippers over it. Upon this ground alone

alone the defendants are entitled to retain the value of the goods.

1803.

COXE *against* HARDEN.

Postea to the Defendants.

DOE, on the Demise of NUNN, *against* LUFKIN and Others.

Friday, Nov. 11th.

A copyholder demised for one year, and from thence from year to year for the term of thirteen years more, *if the lord would license, and so as the same should not be liable to forfeiture:* held that the licence of the lord, &c. was a condition precedent to the lease of the further term of 13 years; and the lord having given notice that he would not give such licence, the assignee of the lessor, to whom the premises were surrendered, was holden entitled to recover in ejectment against the tenant after six months' notice to quit; although it appeared that such surrenderee was a trustee for the lord, (the real purchaser,) who had notice of the terms of the demise when he purchased, with an *exception* in the contract of purchase of *all subsisting leases*; and afterwards accepted of quit-rent from the tenant; the consideration of these latter circumstances belonging to a court of equity.

IN ejectment for a messuage and lands, with the appurtenances, in *Great Bromley* in the county of *Essex*, the demise was laid on the 1st of *October* 1802; and at the trial, before *Heath* J., at the last spring assizes for *Essex*, a verdict was found for the plaintiff, subject to the opinion of this Court upon the following case.

The premises in question are holden of the manor of *Great Bromley* in *Essex*, by copy of court-roll at the will of the lord, according to the custom of the said manor, of which *John Hanson*, Esq. is lord. On the 28th of *February* 1795 *Elizabeth Hotchkin*, widow, being then tenant for life of the premises, demised the same by indenture to *John Lufkin*, deceased, to hold to him, his executors and administrators, from the 29th of *September* 1794, "for and during the full end and term of one whole year from thence next ensuing and fully to be complete and ended, and, at the end of the said term of one year, from year to year, for and during the term of thirteen years more (in all fourteen years), *if the lord would give licence and consent*, and *so as the same, or any part or parcel thereof, should not become forfeited or liable to be forfeited*,"* at the yearly rent of 42*l*., payable half-yearly at *Lady-day* and *Michaelmas*. In this deed was contained a clause, that in case Mrs. *Hotchkin*, or the next reversioner, should at any time, during the demise, be desirous to possess all or any part of the premises for their

1803.

Doe d. Nunn against Lufkin.

own actual occupation, or for building on, and should give *Lufkin* or his assigns twelve months' previous notice in writing of such intention, the parts specified in the notice should be surrendered and delivered up, on payment to *Lufkin* of such compensation for giving them up as two persons, appointed by the parties or their umpire, should judge a reasonable satisfaction. Mrs. *Hotchkin* further covenanted and agreed with *Lufkin*, that he, his executors and administrators, paying the above reserved yearly rent, and keeping all other the covenants and agreements therein contained, should hold and enjoy the premises *for and during the term aforesaid*, without the disturbance of the said *Elizabeth Hotchkin*, the persons to whom the next reversion belonged, or any other person, by her means, consent or procurement. By virtue of this indenture *Lufkin* entered and was possessed of the premises till *August* 1801, when he died, having made his will and appointed the defendants executors, who duly proved such will, and have since continued in possession. Mr. *Hanson* having, on the 18th of *September* 1801, contracted as well with Mrs. *Hotchkin* as with the reversioners for the purchase of the premises, together with other freehold and copyhold lands then in the occupation of one *John Cowell* as tenant to Mrs. *Hotchkin*, they by Mr. *Hanson*'s direction, on the 10th of *February* 1802, surrendered the premises to the use of the lessor of the plaintiff, his heirs and assigns; and the plaintiff's lessor was on the same day admitted accordingly. The purchase-money for the premises [223] was paid by Mr. *Hanson*, for whom the plaintiff's lessor is only a trustee. At the time when Mr. *Hanson* agreed for the purchase a written contract was made, containing an exception of all *subsisting leases* (if any there were); and the terms of the demise to *Lufkin* were correctly stated in the abstract of the title which was delivered to Mr. *Hanson* before the surrender of the premises, or payment of the purchase-money. On the 19th of *March* 1802 Mr. *Hanson* caused the following notice to be delivered to the lessor of the plaintiff: "Sir, I the under-"signed *John Hanson* Esq. lord of the manor of *Great* "*Bromley*, in the county of *Essex*, do hereby give you notice, "that I will not grant any licence or consent to or for you, or "any other person or persons, holding any lands or tenements "of or within my manor of *Great Bromley* aforesaid by copy of "court-roll, to demise or let all or any of the lands or tenements "so holden as aforesaid unto any person or persons as under-"tenant

"tenant or under-tenants thereof, for any term or terms of "years; and that I will not give licence or consent to the duration or continuation of any under-tenancy of any such lands or "tenements longer than at will or from year to year only. Given "under my hand this 19th of *March* 1802. (Signed) *John* "*Hanson.*" On the same 19th of *March* 1802 the lessor of the plaintiff signed a notice in writing to the defendants to quit the premises on the 29th of *September* following, and such notice was served upon each of them on or before the 23d of that month. No formal licence was ever given by any lord or lady of the manor of *Great Bromley*, or applied for, in respect of the [224] demise to *Lufkin* contained in the deed of the 28th of *February* 1795. The defendants not having quitted, the ejectment was brought in *November* last. Soon after *Old Michaelmas* 1802, Mr. *Hanson* received from the defendants, and gave them a receipt for a year's quit-rent then payable to him as lord of the said manor, in respects of the premises, and which quit-rent had been regularly paid to him from the year 1794 till that time. Mrs. *Hotchkin* is still living. The question for the opinion of the Court was, Whether the lessor of the plaintiff were entitled to recover? If he were, the verdict to stand; if not, a nonsuit to be entered.

Bosanquet for the lessor of the plaintiff. First, as to what interest was conveyed to *Lufkin* by the lease granted by Mrs. *Hotchkin;* it was only a demise for one year absolutely, with a further term of thirteen years, upon a condition precedent, that of obtaining the lord's licence, *so as the same should not become forfeited*, &c. These words shew a clear intent that the licence of the lord was a condition precedent to the demise of the further term; for if that once vested, the copyhold would be forfeited. What is a condition precedent must be collected from the sense and meaning of the instrument, and not from technical terms, or the relative position of the words; *Hotham* v. *The East India Company* (*a*). [Lord *Ellenborough* C. J. To be sure the words here, "*if the lord will give licence*," and "*so as*," &c. must be considered as making a condition precedent to the demise of the further term; otherwise it would incur a forfeiture contrary to the express stipulation of the party.] Lady *Montague*'s case (*b*), *Matthews* v. *Whetton* (*c*), and

(*a*) 1 *Term Rep.* 645. (*b*) *Cro. Jac.* 301.
(*c*) *Cro. Car.* 233. and *W. Jones*, 249.

Luttrell

1808.

Doe d. Nunn against Lufkin.

*[225]

[226]

Luttrell v. *Weston* (a), shew that unless the words of the lease be restrained by this *condition precedent they will work a forfeiture; but not if they are so restrained, according to *Lenthall* v. *Thomas* (b). Then if this were a lease for one year absolute, with a lease of a further term upon a condition precedent, the larger interest could not vest till the condition was complied with. *Co. Lit.* 216. *b.* 217. *a* & *b.* *Com. Dig.* tit. *Condition,* B. 3. There is nothing in the subsequent part of the deed to enlarge by implication the interest conveyed by the express words of the demise; for it cannot be inferred from the proviso for the lessor's resuming possession, in case of an intention to build on the premises, that a larger interest than a lease for a year was intended to be conveyed *absolutely;* for as a larger interest was conveyed *conditionally*, it was necessary to make such a stipulation in case of that event. Neither can the covenant for quiet enjoyment during the term enlarge the interest; for if it operated as a bar to the lessor's demand of possession at all events during the full term, it would be equivalent to an absolute demise, contrary to the intention expressed by the parties. But a mere covenant for quiet enjoyment will not enlarge the term, for if it did, it would work a forfeiture, which is contrary to Lady *Montague*'s case. And in *Hamlen* v. *Hamlen* (c), *Yelverton* J. takes the distinction between a lease for a year, et sic de anno in annum during ten years, which is a good lease for ten years, and cause of forfeiture if made by a copyholder; and a lease of copyhold for one year, "with a *covenant* that after the end of that year the tenant shall have the same for another year, and so in this manner de anno in annum for ten years; which is no such lease as will make a forfeiture:" to which the Court agreed. So in *Lenthall* v. *Thomas* (d), it was holden that a covenant in the case of a copyhold would not make a lease: and *Richards* v. *Sealey* (e) is to the same effect. Besides, a covenant that the lessee shall enjoy *during the term*, can only mean such term as passed by the deed. At any rate such a covenant, though it might subject the party breaking it to an action, cannot affect his title in ejectment: and if Mrs. *Hotchkin* could have given notice to quit, so may the lessor of the plaintiff, her surren-

(a) *Cro. Jac.* 308. and 1 *Bulstr.* 215. (b) 2 *Keb.* 267.
(c) 1 *Bulstr.* 189. (d) 2 *Keb.* 67. (e) 2 *Mod.* 79.

deree.

1803.

DOE d. NUNN *against* LUFKIN.

deree. In a court of law the trustee is the only party, and must be considered as any other stranger to the cestui que trust who is the lord of the manor. But it is not necessary to contend that: for if the lord of the manor himself had been the lessor of the plaintiff, he would have been equally entitled with Mrs. *Hotchkin* to enter. There is no reason why he may not take advantage of his own refusal to grant a licence. A grantor may choose to carve out his estate upon a condition precedent to be performed by himself; and if he do not perform it the estate will not vest. In some respects the lord of the manor stands in a better situation than Mrs. *Hotchkin*, supposing she was barred by her covenant for quiet enjoyment; for as no licence was granted, the common law reversion, upon which alone the covenant could attach, did not pass to her surrenderee. The whole common law estate in copyhold remains in the lord; and if a lease be made without licence, the common law reversion upon such lease does not pass by the surrender and admission; though, if a previous licence had been obtained, the admission of the surrenderee might have passed the reversion which had been created by the licence on the rolls of the manor. *Glover* v. *Cope* (*a*), (which over-ruled *Brasier* v. *Beale* (*b*),) and *Gollings* v. *Harding* (*c*). It appears, however, by the report in *Modern* of *Glover* v. *Cope*, that there was a custom to [227] lease for 31 years without the licence of the lord, and therefore the lease there was good. But here there was no express licence, and the lord has done nothing from whence a licence can be presumed. In *Richards* v. *Sealy* (*d*) the Court said, that a licence could not be supposed in that case, though it were to prevent a forfeiture. *Lufkin* was no party to the lord's agreement with Mrs. *Hotchkin*: and even if he had been, the exception of existing leases, could only apply to such as were legal, availing leases. Then, as to the receipt of the quit-rent by the lord, which is stated in the case, as *Lufkin* was legally tenant from year to year, his possession was not tortious until the expiration of the notice to quit, and consequently he was bound to pay quit-rent up to that time: the lord's acceptance of it, therefore, could not even amount to a waver of a forfeiture, much less to a licence.

(*a*) 1 *Salk.* 185. 1 *Show.* 284. 3 *Lev.* 326. and 4 *Mod.* 80.
(*b*) *Yelv.* 222. *Cro. Jac.* 305. (*c*) *Cro. Eliz.* 606, 622.
(*d*) 2 *Mod.* 81.

Marryat

1803.

Doe d. Nunn *against* Lufkin.

Marryat contrà. The lessor of the plaintiff purchased with full notice of the terms of demise from Mrs. *Hotchkin* to *Lufkin*. The question, whether this were a lease in præsenti for 14 years or only in futuro, must turn upon the apparent intent of the lessor and lessee to be collected from the whole of the instrument; in construing which the Court will, as the rule is laid down in 4 *Bac. Abr.* 161. K., rather violate particular words than the general intent. Now clearly there was no con-
[228] tract for any future lease to be granted, but the demise for the whole period was to take effect under that deed. The primary object then was to lease for 14 years, and the next was to grant it so as not to create a forfeiture. Now here the lease was executed on the 28th of *February* 1795, to be computed and take effect from the 29th of *September* preceding; and it contained a clause, requiring the landlord if he wished to occupy at any time *during the demise* to give the tenant *twelve months'* previous notice to quit; a notice which could not expire till after the determination of the first year from the date of the demise, to which it is attempted to confine the absolute term demised. This clause evinces that the intention of the parties was to demise instanter for the whole period mentioned. This is confirmed by the consideration that the deed contains no clause making the duration of the term eventual upon the obtaining of the lord's licence. And if it were not meant to be for more than one year absolute, the clause respecting the twelve months' notice could have no application. It was therefore the apparent intention of the parties to put th tenant in immediate possession under the lease; but to protect the estate from forfeiture by a licence from the lord to be afterwards obtained. The word, "*and* so as, &c." should be read "*or* so as the same should not become liable to forfeiture:" for of course there could be no forfeiture if the lord gave his licence. Then if the estate may now be holden for the full term of 14 years without forfeiture, it will enure accordingly, without violence to any part of the intention. Now the lord by the receipt of quit-rent, after notice of the terms of the demise to *Lufkin*, and of the consequent forfeiture, admitted the existence of the copyhold tenancy, and therefore waved the for-
[229] feiture. The lease therefore is now valid for the whole term, without incurring the forfeiture of the estate out of which it was carved. [Lord *Ellenborough* C. J. Is not all this matter of

1803.

DOE d. NUNN *against* LUFKIN.

of equitable cognizance? The action here is not brought by the lord for the forfeiture, which might raise a question at law, but by the legal reversioner, who founds his claim upon the imperfection of the lease.] This was a demise for a year certain, with a further conditional demise to take effect if it might without forfeiture; and the condition is now performed which gives a legal title.

Lord ELLENBOROUGH C. J. The defendants must contend that the intention of the parties was to grant a lease contrary to the custom for 14 years absolute, and that a forfeiture was incurred eo instanti that the lease was granted, which is directly contrary to the express words of the demise, which is for one year, and at the end of that year, from year to year, for thirteen years more, *if* the lord would give licence, "and "*so as* the same should not become forfeited or liable to be "forfeited." These words clearly make a condition precedent; and the plain intention of the parties was to grant the utmost term consistent with the tenure of the estate, but with a laborious provision made to preserve it from forfeiture; and they therefore stipulate for the consent of the lord beyond that term: but the lord having refused his licence, it stands then as a simple demise for one year certain, and afterwards *Lufkin* held as tenant from year to year: therefore the original lessor or her assignee might determine the tenancy by giving six months' notice to quit; and such notice having been given, the lessor of the plaintiff is entitled to recover.

Per Curiam, Postea to the Lessor of the Plaintiff.

1803.

Saturday, Nov. 11th.

TAPPENDEN, FAVENE, MILLER, CRALLAN, and MILLSON, Assignees of BLINKHORN and MUSGRAVE, Bankrupts, *against* BURGESS.

A deed, whereby a bankrupt conveys *all* his property in trust to divide amongst his creditors, is an act of bankruptcy, though the creditors with whom such deed was in the first instance concerted, afterwards, and when it was executed, changed their purpose unknown to the bankrupt and intended to set it up as an act of bankruptcy. And such deed is operative though it contain a proviso to be void if the trustees think fit. And a commission of bankrupt being afterwards sued out thereon upon the petition of a creditor who had not concurred in such fraudulent deed, and who, together with others who had so concurred, was chosen assignee: held that it was no objection to an action brought by them as assignees for the recovery of part of the bankrupt's estate, that some of them had concurred in such fraudulent deed set up as the act of bankruptcy; for such estoppel applies not to assignees who are mere trustees for the creditors at large, but only to a petitioning creditor who originates the commission.

IN assumpsit for money had and received to the use of the plaintiffs as assignees of the bankrupts, the only questions turned upon the validity of the act of bankruptcy, and the right of the plaintiffs to insist upon it. As to which, the facts appeared to be, that *Blinkhorn* and *Musgrave*, traders, finding themselves in failing circumstances, called a meeting of their creditors together on the 1st of *February* 1802, and laid before them the state of their affairs. Nothing was resolved upon then; but at a subsequent meeting on the 12th of *February*, *at which Tappenden one of the plaintiffs was not present*, it was resolved that *Blinkhorn* and *Musgrave* should make an assignment of *all* their estate and effects to trustees for the benefit of all their creditors; and *Tappenden* and the other plaintiffs (all of whom except *Tappenden* were present and concurring) were nominated trustees. Accordingly a trust deed was prepared, which was dated and executed on the 22nd of *March* by *Blinkhorn* and *Musgrave*, and by all the creditors, including the plaintiffs, except *Tappenden*, who as a creditor was adverse to the proposal from the first, and always refused, when applied to, to execute the deed. It appeared however that between the 12th of *February* and the execution of the deed on the 22d of *March*, the principal creditors who had on the 12th of *February* *proposed the execution of that deed to the insolvent traders, and who then intended that it should have been executed by them as a valid operative deed for the purpose of making an equal distribution of their effects amongst all the creditors, had changed their purpose (probably upon finding that *Tappenden*, one of the principal creditors, would not come into the proposal), and had resolved to procure the execution of the

deed

1803.

TAPPENDEN and Others, Assignees, &c. v. BURGESS.

deed by the insolvents for the express purpose of making them bankrupts; in which purpose all the present plaintiffs and assignees, except *Tappenden*, concurred: but it did not appear that the bankrupts themselves when they executed the deed on the 22d of *March* were privy to that change of purpose. The deed which was also executed by all the trustees, except *Tappenden*, contained a proviso that it should be void if the trustees should think fit to avoid it: (which the Court in the course of the argument observed was the same in effect with respect to this inquiry as if there were no such proviso in the deed, as in the mean time, and till the signification of such avoidance by the trustees, it was an operative deed in the terms of it; and not like a proviso that the deed should be void *if all* the creditors did not assent to it.) A commission of bankrupt was sued out on the 25th of *March* upon the petition of *Tappenden*, founded upon the act of bankruptcy by *Blinkhorn* and *Musgrave* in executing the deed of assignment of all their property; upon which they were declared bankrupts, and *Tappenden* and the other plaintiffs were chosen assignees.

At the trial before Lord *Ellenborough* C. J. at the last sittings it was objected on the part of the defendant, 1st, that the execution of the deed of the bankrupts having been concerted and procured by the creditors for the express purpose of making an act of bankruptcy, and not intended at the time to be [232] acted upon as a valid operating instrument for the object which it purported to secure, was not an act of bankruptcy, but altogether fraudulent and void ab initio. But, 2dly, if it were otherwise in regard to creditors or third persons not privy to the fraud, yet that four of the assignees, the now plaintiffs, having been actually privy to it, were on that account concluded from making title to the bankrupts' estate through the medium of such fraudulent act of bankruptcy procured by themselves. The objections were over-ruled, and a verdict given for the plaintiffs, with liberty to the defendant to move to set it aside and enter a nonsuit if the Court should think either of the objections well founded.

Erskine and *Gurney* shewed cause against the rule. It was long ago settled in *Harman* v. *Fishar* (a), and since in *Bam-*

(a) Cowp. 123.

1803.

TAPPENDEN and Others, Assignees, &c. *against* BURGESS.

ford v. *Baron* (*a*), and *Eckhardt* v. *Wilson* (*b*), that a deed of assignment by a trader of all his effects, though for the benefit of his creditors in general, is fraudulent and void, and an act of bankruptcy. This doctrine is founded upon the consideration that such a deed exhibits one of those decisive indications of insolvency, which shews that he is no longer capable of carrying on his trade. But this case is endeavoured to be distinguished from those, on the ground, that however the deed, as originally contemplated by all parties, was intended to operate as an effectual conveyance of the property, yet at the time when it was executed it was not intended to be acted upon, but was procured for the express purpose of making the grant-[233]ors bankrupts. But admitting that those who were privy to this purpose would be concluded from setting up the deed as an act of bankruptcy, yet it would be valid at least as against the bankrupts to whom such change of purpose was not known, and who executed the instrument eo animo to transfer their property to the trustees. An act of bankruptcy is the act of the bankrupts themselves, and not of others: and the only question which can arise on this subject is, whether those creditors acted in *collusion with the bankrupts*. If the act done were not collusive on the part of the bankrupts themselves, nothing done or contemplated by any of the creditors could affect the right of *Tappenden* the petitioning creditor, who was no party to the fraud, but always refused to come in under the deed. Then it is objected, that supposing the execution of such a deed to be a complete act of bankruptcy, still the assignees of the bankrupt, some of whom were privy to the transaction, are estopped from setting it up and suing upon such a title. But the answer is, that the assignees do not sue for themselves but for the benefit of the bankrupt's estate of which they have been chosen trustees. And if such an objection were allowed, it would tend to defeat *Tappenden* and other creditors who were not implicated in the fraud from recovering their just debts, by rendering every suit fruitless which was brought to recover any part of the bankrupt's estate.

Gibbs and *Wood*, in support of the rule, endeavoured to distinguish this from the general current of authorities, upon the grounds before stated, that here the creditors in general who

(*a*) *Tr. Term* 1788, cited in *Edwards* v. *Harben*, 2 *Term Rep.* 591.
(*b*) 8 *Term Rep.* 140.

procured

1803.

TAPPENDEN and Others, Assignees, &c. *against* BURGESS.

procured the deed (including most of the assignees who now sue, and attempt to set it up as an effective operative act at the time), had at the instant of its being executed resolved to make it an act of bankruptcy. *Then what was that but a resolution that it never should take effect, or have the operation which it purported in the terms of it to have, and for which alone the bankrupts were induced to execute it. To make an act of bankruptcy, there must be a fraudulent act or conveyance *whereby creditors may be defeated or delayed.* To effect which the deed must be a complete and perfect grant; and to complete a grant it must not only be executed, but it must be *accepted* by the trustees, otherwise it is only *an intention* to grant. Now here it appears that the trustees never intended to carry it into effect, which is a virtual rejection of the trust. [Lord *Ellenborough* C. J. The trustees executed the deed, intending to make it available as far as they thought proper.] Then, 2dly, the trustees who now sue in the character of assignees, having assented to the deed, are by the authority of *Bamford* v. *Baron* (a) estopped from setting it up as fraudulent and an act of bankruptcy. And it is no answer that they are mere trustees, for they are the only parties to this suit which a court of law can take notice of, and cannot make title through the medium of their own fraud. As in *Bauerman* v. *Radenius* (b) the declarations and admissions of the plaintiff on the record, who appeared to be only a trustee, were holden to be evidence to affect the right of his cestui que trust. *[234]

Lord ELLENBOROUGH C. J. If *Tappenden* had signed the deed of trust, he could not *as petitioning creditor* have availed himself of it to set it up as an act of bankruptcy, according to the case referred to of *Bamford* v. *Baron*: but he never assented to it, and therefore stands clear of all objection as privy to the act. But it is urged that that objection at all events applies [235] to the other assignees of the bankrupts' estate who are plaintiffs on this record, and that they being parties to the fraud, shall not, though only suing here in the character of trustees, be made use of as instruments to carry it into effect. There is, however, no case which goes the length of saying that the creditors of a bankrupt shall be disabled from suing to recover his estate, because any of those who have been chosen assignees (who are

(a) 2 *Term Rep.* 594. (b) 7 *Term Rep.* 663.

 not

1803.

TAPPENDEN and Others, Assignees, &c. *against* BURGESS.

not necessarily creditors) have been guilty of a fraud in urging the bankrupt to the commission of an act of bankruptcy with a view to take advantage of it. Then with respect to the bankrupts themselves, their fraud, in a legal sense, was complete; for whatever might have been the intent of others, they purposed to devest themselves of all their property, and incapacitate themselves from any longer carrying on their trade; and this purpose they actually effected. Then they have done every thing on their part to make it a complete act of bankruptcy. The defendant's argument, then, rests altogether on this; that some of those who now sue as assignees are personally estopped to insist on the execution of this deed as an act of bankruptcy, it having been procured by themselves for this purpose: but there is no case which decides that the other creditors shall be estopped, because a person happened to be elected an assignee who had acceded to such a deed. Such an estoppel has only been holden to apply to the petitioning creditor, who in this instance is free from any objection; and neither reason, justice, nor policy, warrant us in carrying the estoppel further.

GROSE J. Here the bankrupts themselves have done an act to devest them of all their property, which by all the cases is an act of bankruptcy. The only objection then is, that the assignees (excepting *Tappenden*) who now sue are estopped from setting this up as an act of bankruptcy which was done by their procurement. But if they were holden to be estopped, it would deprive the other creditors of the right which they have to acquire the bankrupts' property under the statutes relating to bankrupts; and nothing has been shewn to affect them.

[236]

LAWRENCE J. The argument of the defendant has proceeded upon confounding the case of a petitioning creditor with that of assignees, and applying to the latter what is only cause of objection to the former; for it is admitted, that if other persons than those who were privy to the fraudulent deed had been chosen assignees, no objection would have lain to the action on account of the persons suing. Then, as far as the bankrupts themselves were concerned, the execution of such a deed was a clear act of bankruptcy. And no objection can be urged against the right of *Tappenden* to be the petitioning creditor; the object of whose petition was, that the bankrupts' property

1803.

TAPPENDEN and Others, Assignees, &c. *against* BURGESS.

property might be by the commissioners transferred to assignees for the benefit of the creditors. The goodness of the commission depends on the right of the creditor to petition, and not upon who the assignees may be who are afterwards to be chosen, and in whom the assignment vests the property notwithstanding any fraud they may have been guilty of, not connected with the assignment; and therefore they are entitled to recover in this case.

LE BLANC J. It is objected, first, that the act of bankruptcy was not complete, because, at the time of the execution of the trust-deed by the bankrupts, it was not intended to be carried into execution by the creditors, but merely to be used for the purpose of making them bankrupts: but the act of bankruptcy was then complete; for it consists in the fraud (for such the law considers it) intended against the creditors by the bankrupts; which fraud was carried into execution as far as depended upon them by the execution of the deed. And though the creditors had changed their minds at the time, and had resolved not to act upon the deed, yet if they afterwards changed their minds again, the bankrupts could not have prevented its being carried into execution. And the creditors, notwithstanding their resolution at the time when the deed was executed, might have changed their minds, and determined to carry it into effect, if the insolvents had not been made bankrupts. Then if there were fraud in the bankrupts, and none in the petitioning creditor, supposing this objection to some of the assignees who were chosen afterwards could prevail, it would be very easy for a bankrupt who could procure a majority in number and value of his creditors to assent to such a deed, to prevent any effect from a commission sued out against him by an adverse petitioning creditor who had refused to come in under it: because as they would have to name the assignees, the objection might be urged against any proceeding instituted by them in execution of such commission, and for recovering the bankrupts' estate. [237]

Lord ELLENBOROUGH C. J. afterwards added, that the objection was really resolvable into this, that a commission of bankrupt would be good or bad according to the choice of assignees.

Rule discharged.

1803.

Monday, Nov. 14th.

Lord Viscount NELSON against TUCKER.

By the 4th article of the King's proclamation of 1797, respecting the distribution of prize, as to flag officers, it is directed, that a chief flag officer *returning home* from a foreign station shall have no share of the prizes taken by the ships *left behind to act under another command*: this applies as well to *another command devolving by seniority* as to *another chief flag officer appointed by express commission* to succeed the officer returning home: and such *returning home*, &c. means the commencement in fact of a commander in chief's departure from the local station of his command for the purpose of returning home, *leaving* his fleet *behind*, i. e. leaving it for all effective purposes under the controul of another commander competent, under the terms of the proclamation, to command in his stead. Therefore where a flag officer, commander in chief in the *Mediterranean*, returned to *England* by leave of the Admiralty for the recovery of his health, leaving the fleet under the command of the next flag officer in seniority, but having, before his departure, dispatched one of the fleet on a cruise, who made captures within the limits of the station, after the departure homewards of such commander in chief out of those limits, but before any new orders given by the next flag officer on whom the command of the station had devolved: held that the right to the 1-8th, or commanding flag officer's share of prize, belonging to the *present acting* flag officer in command on the station, and not to the chief flag officer returning home, although the latter still retained the title, pay, and table-money, of commander in chief, after his return home, and did not resign his commission as such till after the prize taken, and had official correspondence with the Admiralty in that character till his resignation, and made appointments in the fleet as such; the governing principle of his Majesty's proclamation being that the reward of prize should be attached to the present effective commander on the station, and not to the nominal one who *returns home, leaving* ships *behind to act under another command*.

THIS was an action of assumpsit commenced in *C. B.* for money had and received, money paid, and upon an account stated which was brought to determine the right to a considerable sum of prize money between the present plaintiff and Earl *St. Vincent*, the former of whom succeeded the Earl in the command of his Majesty's fleet in the *Mediterranean* in the course of the last war. At the trial before Lord *Alvanley* at *Guildhall* a special verdict was found, in substance as after stated, upon which the Court of *C. B.* were equally divided in opinion; but at the prayer of the plaintiff's counsel, one of the Judges who thought with the plaintiff agreeing to withdraw his opinion, judgment was given pro formâ for the defendant (*a*), on which a writ of error was now brought.

The special verdict set forth, that before the making the capture next after mentioned, viz. on the 2d of *October* 1795, the Lords Commissioners of the Admiralty, by their order in writing, appointed Earl *St. Vincent*, *(then Sir *John Jarvis*) Kt. of the Bath, Admiral of the Blue, commander in chief of his Majesty's ships in the *Mediterranean*, and thereby required him forthwith to take upon himself such command accordingly, and charged all captains, officers, &c. of his Majesty's said ships to obey him as their commander in chief, and charged him likewise to follow such orders and directions as he should from time to time receive from the Admiralty, or any other his supe-

(*a*) 3 *Bos. & Pull.* 257.

*[239] rior

rior officer. Earl *St. Vincent* arrived at the said station, and took upon himself the command, the limits of which command did not then extend beyond the *Straits of Gibraltar;* but afterwards, and before the capture after mentioned, and whilst the said Earl was such commander in chief, an order of the Admiralty of the 7th of *November* 1796 gave liberty to the Earl to extend the limits of his command as far to the northward as *Cape Finisterre*, and to take such a situation either within the *Mediterranean* or on the coasts of the *Atlantic*, as far as the last-mentioned Cape, as on a consideration of all the existing circumstances might appear to him to be best. In pursuance of which the Earl afterwards, and before the issuing of the order after mentioned to Captain *Digby*, and before the making of the capture in question, did extend the limits of his command along the coast of *Spain* and *Portugal*, as far to the northward as *Cape Finisterre*, and at the time of the capture in question the limits of the station remained so extended. Earl *St. Vincent* afterwards applied to the Admiralty for leave to return to *England* for the re-establishment of his health, and the Lords Commissioners, by a letter to him of the 2d of *November* 1798, granted him permission so to do, on his *leaving the command* of the fleet in the charge of the officer next in seniority to him, with such instructions for such officer's guidance as the Earl judged necessary, if upon the receipt of such letter he should find that the state of his health absolutely required it. Lord *St. Vincent*, by letter of the 28th of *December* 1798, declined availing himself of that indulgence, unless compelled by a return of his complaint to relinquish the command; and on the 11th of *March* 1799, while he still continued in his command, he gave a written order to Captain *Digby* of the *Alcmene*, one of the King's ships under his Lordship's command, to cruise off the north-west coast of *Spain* as long as his water and provisions would last, for the protection of the trade of the King's subjects and his allies, and then to re-victual at *Lisbon*, and return to the station, there to act as before directed until further orders; which station was found to be within the extended limits of Lord *St. Vincent*'s command. On the 16th of *June* 1799, Earl *St. Vincent*, in pursuance of the permission given to him by the Admiralty as aforesaid, by his order in writing as commander in chief, directed to Vice-Admiral Lord *Keith*, the officer next in seniority to the said Earl, after reciting such permission in the terms before men-

[240]

1803.

Ld. Nelson *against* Tucker.

tioned, proceeded thus: "Desirous as I am of giving all possible effect and energy to his Majesty's service, at a crisis "which admits of no impediment, but, on the contrary, demands the fullest exercise of an efficient and uncontrolled "authority, I have resolved, on maturely considering these "important objects, and your lordship's zeal, &c. in the attainment of them, to avail myself of the permission thus provisionally granted, *and to leave his Majesty's fleet serving* "*upon the station under your command.* Your lordship is "therefore *hereby required and directed to take the several* "*flag officers and captains of the said fleet under your command accordingly.*" This order was delivered to Lord *Keith* on the said 16th of *June*: notwithstanding which Lord *St. Vincent* continued on the said station in the full and actual exercise of all the powers and authorities of such commander in chief until the 31st of *July* 1799, when, in pursuance of the aforesaid permission given to him, he sailed from *Gibraltar* for *England* in his Majesty's ship *Argo*, and on the 16th of *August*, before the capture in question after mentioned, arrived at *Spithead* in *England*, and immediately applied for and obtained the permission of the Admiralty to go to *Bath* for his health, whither he went, and continued in *England*, until the 26th of *November* 1799, *without having resigned or being superseded in or removed from his office of commander in chief as aforesaid;* and during all that time he was continued and borne, as such, upon the books of his Majesty's said ship *Argo*. On the 29th of *July* 1799, Lord *Keith*, under orders from Lord *St. Vincent*, who still remained at *Gibraltar*, passed the straits of *Gibraltar* together with Vice-Admiral *Parker*, the officer next in seniority to him, and a detachment of the *Mediterranean* fleet, in pursuit of the fleets of *France* and *Spain*, and about the 10th of *August* they passed *Cape Finisterre*, the northernmost limit of the *Mediterranean* station; and Lord *Keith* having chased the enemy's fleets into *Brest*, afterwards, in pursuance of orders from the Admiralty, dated the 16th of *August*, proceeded with his squadron to *Torbay*, and put himself, on the 19th, under the command of Lord *Bridport*, commander in chief of the channel fleet. After Earl *St. Vincent*, Lord *Keith*, and Vice-Admiral *Parker*, had quitted the *Mediterranean* station, Lord *Nelson* became and continued *at* and until after the capture in question *the senior admiral personally serving within the limits of that station;* and before the capture in question, the Admiralty sent

[241]

1803.

Ld. NELSON *against* TUCKER.

sent orders to Lord *Nelson*, dated the 20th of *August* 1799, informing him, " that from the circumstance of Lord *St. Vincent* having returned to *England* for the recovery of his health, and Lord *Keith*, with other flag officers, having quitted the *Mediterranean* in pursuit of the enemy, he (Lord *Nelson*) *was become the senior officer of his Majesty's ships in the* Mediterranean; and that, *till the return of Lord* Keith *or some other superior officer, he (Lord* Nelson) *would have all the important duties* of that station to attend to. That it was probable Lord *Keith* had left for his (Lord *Nelson*'s) information and guidance such orders and instructions as he had received either from the Admiralty or Lord *St. Vincent;* but, lest his having quitted the station unexpectedly should have prevented his so doing, the Admiralty thought fit to point out those objects to which it would be necessary that he (Lord *Nelson*) should be particularly attentive." Amongst other things, Lord *Nelson* was thereby directed to watch the motions of the ships remaining in *Cadiz*, and to station a sufficient force to blockade that port; to insure the safety of convoys passing to and from the *Mediterranean;* and to point his attention to certain services, &c. as far as the force under his orders would admit. Lord *Nelson, so being the senior flag officer personally serving on the* Mediterranean *station*, made and issued various orders in writing to such officers and commanders of squadrons and vessels serving on the same station as he happened to fall in with, *but did not give any orders or directions whatever to, or fall in with, the captain of his Majesty's said ship* Alcmene. On the 15th of *October* 1799, the Admiralty issued a written order to Lord *St. Vincent*, directing him " *to order* the several captains and commanders of his Majesty's ships *under his command* to substitute in future" a certain private signal to the Post-office packets for that before used. On the 16th of *September* 1799, by his order in writing, Lord *St. Vincent* appointed *J. B.* to act as flag lieutenant on board the *Argo:* in which order he stiled himself " *commander in chief of his Majesty's ships*, &c. *in the* Mediterranean:" and having, as he stated, " *promoted* Lieutenant *T. L. M. my flag lieutenant* on board his Majesty's ship *Argo, to the command of his Majesty's sloop* Cameleon. The special verdict then set forth certain letters to Earl *St. Vincent* from the board of Admiralty, after the Earl's return to *England* for the benefit of his health, and before he resigned [243]

his

1803.

Ld. NELSON *against* TUCKER.

his said commission of commander in chief; the first of these dated 20th of *August* 1799, acknowledges the receipt of two official letters transmitted to the Board by the Earl from officers in the *Mediterranean* fleet, and the approbation of the Board at the Earl's having granted permission to Mr. *Tucker* to come home. Another, dated the 26th of *September* 1799, acknowledging the receipt of the Earl's letter of the 24th, transmitting two letters from Captain *Digby* of the *Alcmene*, containing an account *of the captures* he had made. A third, dated the 4th of *November* 1799, acknowledging the receipt of other inclosures transmitted through the Earl from the fleet. Then followed various orders from the Admiralty Board to Lord *Nelson*, continuing through the months of *September October*, and *December* 1799, and *February* 1800, directing him to furnish the officer who should be sent by him to take charge of the *Leander* ship of war, recaptured by the *Russians* from the enemy, with a certain sum to be distributed amongst the recaptors, and to draw bills for the amount: apprising him of the Admiralty having promoted a certain lieutenant to be commander, and appointed him to the *Perseus* bomb; and sending

[244] Lord *Nelson* the commission to deliver to him: apprising him of a mistake in the book of signals: directing him to order the several captains, &c. *under his command* to substitute in future one sort of signal flag for another: communicating leave to him to permit the *Portuguese* squadron serving *under his orders* to return to *Lisbon* for repairs, if required by their Court: acknowledging the receipt of papers relative to Sir *Sidney Smith*'s conduct at, and defence of *Acre*, and directing Lord *Nelson* to signify to Sir *S. S.* the high sense entertained of his very meritorious services; and also confirming some promotions made by Lord *Nelson* in the fleet: ordering him to permit a certain chaplain to resign his appointment and return home: acknowledging the receipt of Lord *Nelson*'s letter, informing the Board of his having, upon a particular occasion, left the command of the squadron for a short time under the command of Captain *Trowbridge*, to whom he had on that account given permission to wear a broad pennant, and communicating the non-disapprobation of the Board, under the peculiar circumstances and for a time to be limited by the occasion; acknowledging the receipt of letters relating to certain occurrences, and his views respecting the speedy reduction of *Malta*: agreeing to allow

1803.

Ld. NELSON *against* TUCKER.

allow reasonable expences to a commissary, and approving Lord *Nelson's* recommendation in his favour; and adopting his recommendation of certain other officers. The, special verdict then stated, That on the 17th of *October* 1799, *after Lord St.* Vincent's *return to* England, *and whilst Lord* Nelson *was the senior Admiral personally serving on the* Mediterranean *station, and before Lord St.* Vincent *actually in fact resigned or had been superseded in or removed from his said office of commander in chief*, Captain *Digby*, of the *Alcmene*, a ship belonging to the *Mediterranean* fleet, (*not having received any order subsequent* to that of the 11th of *March* 1799 from Lord *St. Vincent*, and having been detached by that order from the said fleet, in company with other ships) went with the *Alcmene* and those other ships to *Muros Bay*, to the southward of *Cape Finisterre*, and *within the limits of the station on which he was so dispatched to cruise by Lord St.* Vincent, and there captured two *Spanish* ships of war (*Spain* being then an enemy), which have been since condemned as prize in the Court of Admiralty. Lord *Nelson* was not actually on board the *Alcmene* at the time of such capture. The defendant *Tucker* was and still is prize agent for the flag officers of the *Mediterranean* station, and as such has received the produce of the captures: and Lord *Nelson's* share, if he be entitled to the commanding flag officer's share, amounts to 13,015*l.* 4*s.*, which remains in the defendant's hands. The special verdict then set out the King's proclamation of *January* 1797, as after-mentioned, for the distribution of prize; and then stated that on the 26th of *November* 1799, Lord *St. Vincent* resigned his said commission of commander in chief, which was accepted by the Lords of the Admiralty: and that Lord *St. Vincent* received his pay and table-money as such commander in chief up to the day of his resignation; and after Lord *St. Vincent* left the station, Lord *Nelson* continued to receive the same pay as before, but not pay as commander in chief. But from the 12th of *August* 1799 Lord *Nelson* received the like table-money with Lord *St. Vincent*.

[245]

Proclamation directing the distribution of prize.

The King's proclamation of the 25th of *January* 1797, set out in the special verdict, is entitled "a proclamation for granting distribution of prizes taken from the King of *Spain* or "his subjects subsequent to the 9th of *November* 1796, the "date of his Majesty's order in council for granting general "reprisals

1803. — Ld. Nelson *against* Tucker. *[246]

"reprisals against the ships and *goods of the King of *Spain* "and his subjects." By which his Majesty's will and pleasure was proclaimed and declared, that the net produce of all prizes taken subsequent to the said 9th of *November*, the right whereof was inherent in his Majesty and his Crown, should be given to the takers in the proportion and manner therein set forth. That the net produce of all prizes taken by any of the King's ships, &c. of war should be for the intire benefit and encouragement of his Majesty's flag officers, captains, commanders, and other commissioned officers in his Majesty's pay, and of the seamen, mariners, and soldiers on board his Majesty's ships, &c. at the time of the capture. And that such prizes might be lawfully sold and disposed of by them and their agents after the same should have been finally adjudged lawful prize, and not otherwise. The distribution should be made as follows: the whole of the net produce being first divided into eight equal parts, the captain or captains of any of the King's ships, &c. who should be actually on board at the taking of any prize should have 3-8th parts; but in case any such prize should be taken by any of the King's ships under the command of a flag or flags, the flag officer or officers *being actually on board*, or *directing and assisting in the capture*, should have one of the said 3-8th parts, the said 1-8th part to be paid to such flag or flag officers in such proportions and subject to such regulations as were thereinafter mentioned, and the remaining 8th parts in manner therein set forth. And the King thereby further directed, that the following regulations should be observed concerning the 1-8th thereinbefore mentioned to be granted to the flag or flag officers *who should actually be on board at the taking of any prize*, or, *should be directing or assisting therein*. "1st, That

[247]

"a flag officer commander in chief, when there is but one flag-"officer upon service, shall have to his own use the said 1-8th "part of the prizes taken by ships and vessels under his com-"mand. 2dly, That a flag officer sent to command at *Jamaica* "or elsewhere shall have no right to any share of prizes taken "by ships or vessels employed there before he arrives at the "place to which he is sent, and actually takes upon him the "command. 3dly. That when an inferior flag officer is sent "out to reinforce a superior flag officer at *Jamaica* or else-"where, the superior flag officer shall have no right to any "share of prizes taken by the inferior flag officer before the in-

"ferior

1803.

Ld. NELSON *against* TUCKER.

"ferior flag officer shall arrive within the limits of the com-"mand of the superior flag officer, and actually receive some "order from him. 4thly, That a chief flag officer *returning* "*home* from *Jamaica* or elsewhere shall have *no share* of the "prizes taken by the ships or vessels *left behind to act under* "*another command.* 5thly, That if a flag officer is sent to "command in the outports of this kingdom, he shall have no "share of the prizes taken by ships or vessels which have "sailed from that port by order from the Admiralty. 6thly, "That when more flag officers than one serve together, the 8th "part of the prizes taken by any ships or vessels of the fleet "or squadron shall be divided in the following proportions, "(viz.) if there be but two flag officers, the chief shall have "2-3d parts of the said 1-8th part, and the other shall have "the said remaining third part: but if the number of flag "officers be more than two, the chief shall have only one half, "and the other half shall be equally divided amongst the "other flag officers. 7thly, That commodores with captains "under them shall be esteemed as flag officers with respect "to the 8th part of prizes taken, whether commanding in "chief or serving under command. 8thly, That the first [248] "captain to the Admiralty and commander of his Majesty's "fleet, and also the first captain to his Majesty's flag officer "appointed or thereafter to be appointed to command a fleet or "squadon of 20 ships of the line of battle, and also the first "captain to his Majesty's flag officer appointed or thereafter "to be appointed to command a fleet or squadron of 15 ships "of the line of battle, provided such last mentioned fleet or "squadron shall be composed of his Majesty's own ships, shall "be deemed and taken to be a flag officer, and shall be entitled "to a part or share of prizes as the junior flag officers of such "fleet or squadron."

The special verdict concluded in the usual form; and was argued very elaborately in *Trinity* term last by *Shepherd* Serjt. for the plaintiff in error, and by *Erskine* for the defendant. But the case was so fully discussed by the learned Judges in the Court of Common Pleas, and afterwards by the Lord Chief Justice of this Court in delivering the opinion of the whole Bench, that it would be superfluous to repeat the arguments urged at the bar; which turned for the most part upon the grammatical, reasonable, and relative construction of the King's several proclamations for the distribution of prize. After the argument

1803.

Ld. NELSON *against* TUCKER.

argument the case was directed to stand over to this term for judgment: and now

Lord ELLENBOROUGH C. J. delivered the opinion of the Court. This is a writ of error brought upon a judgment of the Court of Common Pleas (*a*) in favour of the defendant, in an action for money had and received, and in which the de-
[249] fendant pleaded the general issue. The question arises upon the facts found upon a special verdict in that Court, and is, Whether the plaintiff be or be not entitled, under his Majesty's proclamation of the 25th of *January* 1797, and the prize act of 33 *Geo.* 3. *c.* 66., to the chief flag officer's share in a prize of two *Spanish* ships of war made on the 17th of *October* 1799 by Captain *Digby* of the *Alcmene*, such ship and officer being then under the command of the commander in chief of the *Mediterranean* station? The amount of that share, and that the defendant has received the same in his character of prize agent to the flag officers of that station, and that he now retains the same for the use of the plaintiff (if the plaintiff be entitled to such chief flag officer's share), is admitted. The facts stated in the special verdict, and upon the result of which Lord *Nelson* claims to be so entitled, are in substance as follows. [His Lordship here stated the substance of the special verdict as before set forth.] It appears very clearly from the correspondence which has passed between Lord *St. Vincent* and Lord *Nelson* respectively and the Admiralty board, and from the various documents stated with reference to each of these Admirals, and the relation in which from those documents they respectively appear to have stood in regard to the ships and vessels on the *Mediterranean* station, that Lord *St. Vincent* was considered by the Admiralty Board as commander in chief of that fleet from the 2d of *October* 1795, the date of his original appointment, and that he had all along the pay and table-money as such, and also acted as such for certain purposes down to the 26th of *November* 1799, when he formally resigned the commission by which he had been appointed to that command. It also appears that Lord *Nelson* was, during a part of the same period, comprehending the time when the capture in ques-
[250] tion was made, considered by the Admiralty Board as the *acting* commander in chief on that station, although he received no increase of pay on that account, nor indeed the table-money of

(*a*) 3 *Bos.* & *Pul.* 257.

a commander

1803.

Ld. NELSON *against* TUCKER.

a commander in chief prior to the 12th of *August* 1799. But the question for our consideration is not, which, if either, of these noble Admirals may, in consequence of being so treated and considered by the Admiralty Board, be properly entitled, according to the courtesy or usages of the navy, to the appellation and station as commander in chief for the purpose of honorary distinction, or even for other purposes in some degree effective and substantial; but which, if either, of them, at the period of the capture in question, was *in respect of his actual situation, with reference to the terms of the proclamation, the person intended thereby* to receive the advantage of the chief flag officer's 1-8th share in captures made by the ships on that station. If the proclamation shall be found to be distinctly and unambiguously expressive of his Majesty's intention on the subject, that intention, capable of being so collected, must prevail, and be judicially carried into effect by us, without regard to its agreement or disagreement with any supposed course and practice of the service, or its conformity to the opinion which the Admiralty Board may be supposed to have entertained or intimated on the subject. It is only upon a supposition that some ambiguity exists in the terms of the proclamation itself, that the course of the service, or any other like collateral aids can be resorted to, for the purpose of explanation: it being always to be remembered, that the proclamation which was issued in 1744, (altered as it was in the particulars hereafter mentioned in the year 1756,) was made for the immediate purpose of introducing a new and specific regulation on the subject, to prevent, as it professes, disputes arising amongst flag [251] officers, and to explain and settle the right of flag officers and commanders in future; and of course must, where it varies from them, be allowed to govern and control the antecedent practice and course of service in that respect, and not to be controlled and governed by them. To adopt any other principle of construction would be in all cases to cut down and curtail every new rule, so as to leave the practice meant to be abolished as little altered as possible; in other words, would be to construe the terms of a new rule most favourably to the continuance of the old abuse, instead of most effectually for its suppression. Although the last proclamation, i. e. that of 1797, is the only one stated upon the face of the special verdict, yet as all the other antecedent proclamations on the same subject have been referred to by the counsel as an agreed basis of argument

1803.

Ld. Nelson *against* Tucker.

gument on this occasion, as well as referred to in the judgments given in another place, and as they throw some additional light upon the proclamation now immediately under consideration; it may be material to advert to them, and to the several alterations which have successively taken place in them, in respect to the flag officers' 1-8th; from which it will appear that the Crown has proceeded progressively and constantly upon the principle of appropriating that share of reward, which at first was annexed to the mere station of commander in chief, still more and more to the *immediate, actual, and present exercise* of the efficient functions of principal commander; narrowing from time to time by such successive alterations the advantages before allowed to the *non-resident* commander in chief, if I may so call him, and conferring them, where it should seem that public policy and the interest of the service required that they should [252] be conferred, namely, on the principal, *present*, and *effective* flag officer of the station. This 1-8th share was assigned by the oldest proclamation I have seen, which is that of 1708, and is in terms the same with all the proclamations down to 1740, *to the flag officer or officers being actually on board, or directing and assisting in the capture.* His Lordship here observed, that Lord *Alvanley's* observation in p. 279. of 3 *Bos. & Pul. Rep.* of this case, did not seem correctly founded. He supposes the words "directing *and* assisting" in the proclamation of 1740 to have been changed to "directing *or* assisting" in that of 1744 and the following ones: whereas it stands in that of 1797, following that of 1744, both ways, i. e., in the introductory part of the proclamation, which professes to regulate the distribution, it stands, "directing *and*," &c.; and in the subsequent part which refers to and purports to recite the former part, it stands "*or*." So that it should seem the same thing was thought to be sufficiently and indifferently expressed either in the one way or the other. And so in effect it is: for in the case of a commander not immediately present, the only *assistance* he can give must be in the way of *direction;* and so "*directing and assisting*," and "*directing or assisting*," come to the same thing. In the case of captains of ships it was always required that they should be actually on board in order to entitle them to share in captures: but, in the case of flag officers, actual presence on board was not required: but virtual co-operation, by means of such direction and assistance as might be supposed, however remotely, to conduce to the event of

capture,

1803.

Ld. NELSON *against* TUCKER.

capture, was holden sufficient to entitle them to share. In the construction of these terms, the mere circumstances of holding a commission as commander in chief, and an authority in virtue thereof to direct and assist in the *operations of the fleet, although perhaps never exercised, has been thought sufficient to constitute such a *direction* and *assistance*, by intendment and inference conducing to the event of capture, as entitled the commander in chief to share. And accordingly under that form of proclamation every commander in chief claimed to share from the date and during the continuance of his commission, although he should never have joined his fleet, or have given any order, or done any other official act in his quality of commander. This practice of sharing by commanders in chief, which the proclamation in the form it then bore was understood to warrant, was justly deemed injurious to the service, and to require, upon every principle of sound policy, material alteration and amendment; and which it afterwards received on the 14th of *June* 1744, by his Majesty's proclamation, of that date. That proclamation, which appears to have issued upon an application to the Crown to prevent disputes amongst flag officers, professes, as before observed, to make such *a regulation* as *may explain and settle* the right of flag officers and commanders in all cases of prizes taken from his Majesty's enemies at sea; and then proceeds to order the following regulations to be observed; " 1st, that a flag officer commanding in chief upon service shall have 1-8th part of all prizes taken by ships under his command." This regulation, if not followed by others of a negative and restrictive nature, would have left the flag officers commanding in chief entitled, as he was before, i. e. in virtue of his commission, and as long as such commission should last; but the following regulations circumscribed that right within narrower and more useful limits; confining the commencement of it, as to captures made by ships on any particular station, in the case of a flag officer sent to command abroad, to the period of his actual arrival, and its duration to the period of his actual continuance within the limits of his command. The articles are these; 2dly, " that a flag officer sent to command at *Jamaica* or elsewhere shall have no right to any share of prizes taken by ships employed there before he arrives within the limits of his command." And the spirit of this regulation is carried still further and more strongly marked by the language of the 2d

[*253] (margin, beside "tue thereof to direct and assist in the *operations of the fleet,")

[254] (margin, beside "officer sent to command abroad, to the period of his actual")

1803.

Ld. Nelson *against* Tucker.

article in the proclamation of 1756, and of the later years including 1797: for by them the flag officer sent to command has no share in such prizes "before he arrives," not merely within the limits of his command, but "at the place to which he is sent, and actually takes upon himself the command." 4thly, "That a chief flag officer *returning home* from *Jamaica* or elsewhere shall have no share in prizes taken by the ships *left* at *Jamaica* or elsewhere, *after he has got out of the limits of his command.*" Now I would ask if this 4th article in the proclamation of 1744 had remained unaltered, it were possible to contend that Lord *St. Vincent* was entitled to the commander's 1-8th in the prizes in question, captured, as they were, long after the time when he had got beyond the local limits of his command: except indeed he is to be considered as an admiral not *returning home*, within the terms of the proclamation at any time prior to his actual return, or rather prior to his formal resignation of his commission: which point I will proceed to consider, after having first stated the new 4th article introduced in lieu of the one which is to be found in the proclamation of 1744. And which new 4th article occurring first in the proclamation of 1756, continued in all the subsequent proclamations, including that of 1797, upon which the present question is to be decided, is as follows: 4thly "That a [255] chief flag officer *returning home* from *Jamaica* or elsewhere shall have no share of the prizes taken by the ships or vessels *left behind* to act under *another command.*" The words *left* in the former 4th article, and *left behind* in the latter proclamations, must be understood to mean the same thing, viz. a local severance or separation of the commanding officer from the objects of his command: for if he leave them at all when he is proceeding homeward, he must necessarily leave them *behind.* The whole question must therefore turn on the words "*left behind to act under another command,*" which are first to be found in the new 4th article of 1756, and not in that of 1744, coupled with the words "*returning home,*" which are to be found in the proclamation of 1744, as well as in all the subsequent proclamations, including that of 1797. And these words, "*returning home,*" and ships, &c. "*left behind to act under another command,*" do in their plain, natural, obvious, grammatical sense appear to us to denote and signify the commencement of a departure of a commander in chief from the local station of his command, for the purpose of returning home,

leaving

leaving his fleet behind, and leaving it for all active and effective purposes under the discretion and controul of another commander, competent under the terms of the proclamation to direct in his stead. The words "left behind *to act*," import a devolution upon another of the full, effective, and discretionary authorities and powers for the purpose of acting, i. e. of *active* service (including of course operations both of an offensive and defensive nature), which were before exercised by the officer *returning home*. The words "*another command*," inasmuch as no restrictive words on this head are contained in the proclamation, can by no intendment which the law will warrant us in admitting, be restrained to the command of another flag [256] officer especially appointed by express commission from home to succeed the person returning home, but appear to us clearly to mean the command of another officer competent to exercise the same degree of command over the fleet which the returning commander was before competent to exercise. It would be enough to say in favour of this interpretation of the 4th article in the proclamation in question, that it fully satisfies the plain, natural, and grammatical sense of every word in the article itself; that it accords with every word in every other article in the proclamation; and that it certainly coincides with the presumed object of the several alterations and restrictions before introduced into the frame of the original proclamation. Many reasons may be suggested as likely to have occasioned the last alteration made in the 4th article, whereby the right of the commander in chief to share in prizes is made to determine on his "returning home, and leaving the ships behind to act under another command," instead of upon his "getting out of the limits of his command." One of such reasons may have been, what was thrown out by my brother *Heath* in his judgment in the Common Pleas but as a conjecture only, viz. to obviate the difficulty of ascertaining the point of time, with reference to the date of the capture, when the returning admiral might have passed the capes or headlands which formed the limits to his station. I think, however, if the alteration had been made in order to obviate this difficulty, the same reason would have induced the omission altogether of the same phrase, and a substitution of some other in its stead, in the 3d article of the proclamation where it again occurs, by which the right of the superior flag officer to a share of prizes taken by an inferior flag is made to commence on

1803.

Ld. NELSON *against* TUCKER.

 the

1803.

Ld. NELSON *against* TUCKER.

the arrival of the inferior flag officer *within the limits of his command.* It may however have been altered, and it appears to me probable that it was so, in order the further to promote the useful object alluded to already, i. e. of immediately and strictly connecting effective and present service with its natural and proper reward resulting from capture. The interval which might elapse between the departure of the commander in chief from his fleet, and the time of his passing the limits of his station, might happen to be considerable. It appeared therefore, I presume, to the government of that day to be unreasonable that the succeeding commander should be deprived of the full and immediate rewards of active and successful enterprize, whilst his returning predecessor might happen to be lingering within the limits of his former command. In this view of the provision it seems introduced in furtherance of the same policy which first suggested the propriety of applying any restriction at all to the before unqualified right of sharing by a commander in chief from the date of his commission, and during the whole period of its legal existence. This way of considering the 4th article of this proclamation is, it cannot be dissembled, materially at variance with the decision of Sir *W. Scott* in the case of the *St. Anne* (a), and which I agree with Lord *Alvanley* in thinking not to have proceeded upon the last ground of argument taken by the King's Advocate, viz. that Captain *Mowatt's* command, as not being the command of another flag, was not *another command* within the meaning of the 4th article; but that it proceeded on the ground of Admiral *Murray's* not having abdicated the command, and continuing on that account
[258] entitled to the advantage of it. And supposing Sir *W. Scott* to have decided on that ground, the deference justly due to an authority on all accounts so respectable makes me regret that I cannot bring my mind to agree in the ground of that decision. In construing a legal instrument, by which I find a right once vested to be afterwards made defeasible, and that upon an event or condition plainly and distinctly specified, the event or condition being in this case his "returning home," I dare not allow myself to engraft upon words of so simple and unambiguous a nature qualifications not to be found in any one corner of the instrument itself; nor to say that a "returning home" means, not merely the act of returning home, but that act

(a) 3 *Rob.* 60.

coupled

coupled with a particular motive and purpose, namely, the motive of abdicating the command, and the purpose of continuing at home afterwards discharged from the duties of such command. The right to prize is by the King's proclamation made to determine upon an outward notorious act, consisting of two parts, viz. *returning home*, and *leaving the fleet to act under another command*. The construction given then would require, in addition to the act of returning and leaving the fleet under another command, a motive or intention which the party doing the act might even confine to his own bosom, or which he might announce and declare perhaps for the purpose of erecting in his own favour an excuse for absence from the station of his command; and consistently with which absence, under the construction contended for, he might retain all the advantages of actual command so long as the Admiralty should suffer his commission to remain in force. Such a construction would at once nullify the effect of the article for every essential purpose of present and effective service, and would give a returned commander in chief, if he could keep his real purpose of not returning again to himself, or could steer clear of any formal act of abdication, in the full and entire possession of all the eventual advantages of command which might arise from dangers in which he would not participate, and councils in which he would have no concern. It would surely not be a desirable thing to depart from the plain literal meaning of common and intelligible words occurring in a written instrument, in order to give effect to a construction which would be attended with such consequences; and which construction could only be imposed on these words by importing the materials on which it is to be grounded aliundè, by implication from a supposed practice, to which even if it exist, that instrument in no part refers, and still less professes to be governed by it: and where the adoption of such a construction would render the right to the principal share in prize no longer dependant on actual service, but on the mere interested will of a party, in whom the right of electing, after his return home, and even after a beneficial capture made by the fleet should be vested, whether his own antecedent act of returning home should be and enure in point of effect as a *returning home* within the meaning of the proclamation or not, so as to oust him of his claim to share in the advantage of such capture;

1803.

Ld. NELSON *against* TUCKER.

[259]

1803.

Ld. NELSON *against* TUCKER.

and which if he were disposed to retain it, his own incaution could in this way of construing the article alone take from him, as long as his commission should remain in force. It may be said, that such disingenuous conduct is not to be suspected in a person filling so high and honourable a station in his Majesty's service in any instance, and that it is morally impossible to have taken place in the present. Admitting as we do the

[260] force of this observation in the utmost extent which can be allowed to it, it by no means proves (what indeed, as being contrary to the result of all human experience, cannot be proved) that any law would be useful and expedient which would be so framed as to depend for its effect and application upon the consciences of those whose interests were to be affected by it. It is not therefore probable that such should be the real meaning of any provision of law which is capable of receiving a better and more beneficial interpretation. I have no occasion particularly to advert to the several other cases cited in argument, which are all to be found in *Johnstone* v. *Margetson* (a), and the cases subjoined in the notes thereto. It is enough to say, that our construction of this proclamation is consistent with them all, and indeed with every case I can find to have been ever decided in the courts of law on the subject of prize, except the single case of the *St. Anne*. Supposing, therefore, that Lord *St. Vincent's* claim to share under the circumstances stated is ousted by the 4th article of the proclamation, as we think it is; the only remaining question is, Whether Lord *Nelson* be entitled to share in his place? And feeling as we do no difference between the rights incident to a *command devolved*, and *a command immediately conferred by commission*, in this particular it follows according to what was laid down by Lord *Mansfield* in *Pigot* v. *White* (b), that Lord *Nelson*, as having become the commander in chief by devolution (as Admiral *Pigot* in that case was by special commission), at the time when the prize was taken, must be fully entitled to the benefit of prizes taken during the period of his command by ships sent out under the orders of Lord *St. Vincent*, a preceding commander in

[261] chief on that same station. Lord *Nelson's* very situation as commander in chief at the time rendered him privy to the

(a) 1 *H. Blac.* 261. (b) *Ib.* 265. *n.*

orders

orders before given, and authorised him to revoke, qualify, or carry the same into effect, as he should think fit; and inasmuch as being so privy and authorised, he did not in this instance recal the ships, or revoke the orders under which they were acting, he may be considered as having virtually confirmed and renewed those orders: and in that respect may be fairly deemed by *direction and assistance* to have co-operated in producing the capture in question in his character of chief flag officer upon that station. On these grounds we are of opinion that Lord *Nelson* is entitled to recover the chief flag officer's 1-8th share now remaining in the hands of the defendant for his use, and of course that the judgment given below for the defendant must be reversed, and judgment here given for Lord *Nelson*, the original plaintiff, as well as plaintiff in error.

1803.

Ld. NELSON *against* TUCKER.

Judgment reversed. (*a*)

(*a*) See the next case.

---

*Lord KEITH *against* PRINGLE (*a*).

Monday, Nov. 14th.

An inferior flag officer succeeding by devolution to the principal command,

IN assumpsit for money had and received, tried before Lord *Ellenborough* C. J. at the Sittings after last *Hilary* term at *Guildhall*, a verdict was found for the plaintiff for

upon the returning home of his superior flag officer commander in chief on a foreign station, is entitled under the King's proclamation of 1797 to the chief flag officer's 1-8th share of prize taken within the limits of the station by a squadron which had been detached from the main body, (with which such inferior flag officer remained, by the superior flag officer before his return home; but the prize not taken till after he had passed the limits of his station on such return home: and this, though the superior flag officer before his departure directed the inferior flag officer to take under his command those ships only, by name, which continued with him at the principal station, and the detached squadron *when they returned to the same place* after the particular service performed, for the performance of which he had before limited a time: and though such superior flag officer's commission was stated to be to command in chief a squadron *upon a particular service*, and not merely upon a *particular station*: and though such superior flag officer did not resign his commission of commander in chief till after his return home, and after the prize taken. At least, the superior is not entitled to recover such share of prize from the inferior flag officer who had received it.

(*a*) See the last case.

1803.

Lord KEITH *against* PRINGLE.

£——— subject to the opinion of this Court on the following case; with liberty to either party to turn it into a special verdict.

In *March* 1795 the plaintiff (then Sir *George Keith Elphinstone*,) Rear Admiral of the Red, was appointed by the Board of Admiralty, commander in chief of his Majesty's ships of war at *the Cape of Good Hope* and in the *Indian* seas; and Rear Admiral *Rainier* was, till the plaintiff's arrival, commander in chief in the *Indian* seas. In the order of appointment of the plaintiff he was denominated *commander in chief* of a squadron of his Majesty's ships, &c. *to be employed upon a particular service* (*a*). At the time the plaintiff accepted the command he was authorised by the Admiralty to return to *England* whenever he should think fit. By an order of the 16th of *April* 1796 the Admiralty ordered the defendant, then at *Spithead*, "to take Captain *Osborne* of the *Trident* under his command, and [263] to put to sea with that ship and the *Tremendous*, and proceed with all dispatch to *the Cape of Good Hope*, and to put himself, on his arrival there, under the command of the plaintiff, *commander in chief of his Majesty's ships, &c. on that station*, and follow his orders for his (the defendant's) further proceedings. And the defendant was thereby further directed, in case on his arrival at *the Cape of Good Hope* he should find that the plaintiff had left *that station* and returned to *England*, in that event *to take under his* (the defendant's) *command* all such of his Majesty's ships, &c. *as he might find there*, or which might *arrive there* under orders either to join him or the plaintiff; and to carry into execution any unexpected orders which might have been left with *the commanding officer of his Majesty's ships at that place*, as well as those which he might from time to time receive from the Admiralty for his further proceedings." In pursuance of these instructions the defendant proceeded to *the Cape of Good Hope*, and on his arrival there in *July* 1796, put himself under the command of the plaintiff, who had not then left the station. On the 24th of *June* 1796 the plaintiff wrote to the Admiralty for permission to return to *England*, *as the object of the expedition intrusted to his conduct had been accomplished*: and on the 15th of *November* 1796 he received for

(*a*) There was no designation of any local limits of such particular service in the order of appointment; which was a circumstance relied on by the plaintiff's counsel in the argument.

answer

1803.

Lord KEITH against PRINGLE.

answer that the Admiralty had, by former letters, left him at liberty to exercise his discretion as to his return. On the 9th of *September* 1796 the plaintiff, being commander in chief as aforesaid, sent a squadron of five ships, under the command of Captain *Losack*, of the *Jupiter* from *the Cape of Good Hope*, to cruise off the island of *Mauritius*, which was within the limits of what was then understood to be *the Cape of Good Hope* station; in which order Captain *Losack* was directed to cruise off the *Mauritius for six weeks*, at the expiration of which he was "to return "to this anchorage" (i. e. *Table Bay*, at the *Cape*), first calling [264] at *St. Augustine Bay* for wood, if convenient. And the captains of the ships forming that squadron were, by the plaintiff, at the same time directed to put themselves *under the command* of Captain *Losack*, and follow his orders for their further proceedings. By a further order of the 16th of *September* 1796 the plaintiff directed Captain *Losack* "not to remain off the *French* isles beyond the middle of *November;* and at quitting the station to send the frigates to *Foul Point*, *Madagascar*, for the purpose of seizing the *French* vessels and breaking up their establishment at that place; and he was to be at liberty to send such captures to *India* as were unfit for *the Cape*." In pursuance of these orders Captain *Losack* sailed with the five ships to cruise off the *Mauritius*, and to perform the other services therein mentioned. On the 5th of *October* 1796 the plaintiff, being about to sail for *England*, wrote a letter to the defendant, in which he said; "It is my intention to depart for *Europe* in a "short time with the *Monarch* and *Daphne*, and I have there- "fore the honour of addressing you for the purpose of com- "municating such circumstances as may afford you information "relative to the concerns at this colony, and *explain to you the* "*arrangement I have made to be observed with respect to his* "*Majesty's ships, &c. under my command;* and also to offer you "such *instructions* as I conceive may tend to the advantage "of his Majesty's service; begging leave, at the same time, "to observe my inclination that you should exercise your "own discretion in all points relative to the naval affairs at "this colony, both on board and on shore; and being well as- "sured that they cannot be transferred to any one more ex- "perienced or able to conduct them. *On my departure you* "*will consequently take under your command his Majesty's* [265] "*ships, &c. at this colony*, detaching those intended for *India*

"and

1803.

Lord Keith *against* Pringle.

"and other destinations, conformably to the instructions you "will receive, and the two lists inclosed, containing the names "of the *ships appropriated to this colony*, and of those attached "to the *Indian* station under the command of Rear Admiral "*Rainier*. *The ships, lately sailed under the orders of Captain* "Losack, *named in the margin* (a) *will return hither after their* "*service, and remain under your command*. The isles of "*Mauritius* will always require the attention of his Majesty's "ships; it was therefore my intention, as constantly as practi-"cable, to have cruisers in their vicinity; but as the approach-"ing hurricane season will suspend that service, it will be then "advisable to keep some ships of force cruizing off *the Cape*, "or in the *Mosambique Channel*, to intercept homeward-bound "vessels." This letter also apprised the defendant that the accounts for victualling, and for sick and wounded, would be settled by the plaintiff up to the 30th of *September* 1796, and that from that date they would devolve upon the defendant. This letter was accompanied by lists, dated 6th of *October* 1796: one of which was intitled, "A list of ships that "are to remain *at the Cape of Good Hope*, *under the command of* "T. Pringle, *Esq*. Rear Admiral of the Red," &c. Another was intitled, "A list of ships that are ordered on a cruise and "other services, *on the execution of which* they are *to return to* "*the Cape of Good Hope*, and *remain* under the command of "*T. Pringle*, Esq." &c. (This last contained the five ships composing the squadron under Captain *Losack*.) The third was "a list of ships that are to remain in the *East Indies*

[266] "under the command of Admiral *Rainier*," &c. On the 6th of *October* 1796 the plaintiff, being still commander in chief, issued the following order, directed to the defendant: "You "are hereby required and directed *to take under your com-*"*mand* his Majesty's ships, &c. *at this colony*, and to corres-"pond with the secretary to my Lords Commissioners of the "Admiralty by all opportunities." Signed by the plaintiff. And a similar order, of the same date, was issued by the plaintiff to Admiral *Rainier*, directing him, "to take under his com-"mand his Majesty's ships, &c. *in the Indian seas*, and to cor-"respond with the Secretary of the Admiralty, and also with "Rear Admiral *Pringle*, commanding at *the Cape of Good*

(a) *Jupiter*, *Sceptre*, *Crescent*, *Brave*, and *Sphynx*.

"*Hope*,

" *Hope*, with whom it would be essential to have a constant " communication." On the 7th of *October* 1796 the plaintiff, *with his flag flying as commander in chief*, sailed from *the Cape of Good Hope* for *England*, where he arrived on the 3d of *January* 1797, and *on the 18th of that month struck his flag*. On the 19th of the same month the Admiralty Board signed commissions to the defendant and to Admiral *Rainier*, respectively appointing them *commanders in chief*, the former at *the Cape of Good Hope*, the latter in the *Indian* seas; and on the 20th transmitted such commission to the defendant in a letter signifying his appointment *as commander in chief* of his Majesty's ships, &c. *at the Cape of Good Hope*. The plaintiff did no act to resign or part with his command as commander in chief, nor did the Admiralty do any act to deprive him thereof, *unless the acts stated in this case amount to a resignation or deprivation thereof*. Upon the departure of the plaintiff from the *Cape*, the defendant was the only flag officer within the limits of what was then considered to be *the Cape of Good Hope* station, and Rear Admiral *Rainier* was the only flag officer within the limits of the station in the *Indian* seas. *When the plaintiff quitted* the Cape of Good Hope *he did not intend to return thither to resume the said office of commander in chief*. The squadron under the command of Captain *Losack*, which had been sent by the plaintiff to cruise by virtue of the said orders, on the 9th and 16th of *September* 1796, continued to cruise under those orders, (no others having been sent,) until the *return* of that squadron to *the Cape of Good Hope*, which took place on or about the 20th of *January* 1797; *and during that cruise made several captures within the limits of what was then considered to be* the Cape of Good Hope *station, and after the plaintiff had passed those limits on his return home*. The ships with their cargoes have been respectively condemned as lawful *prize*; and one-eighth part of the prize money amounting to £ has been paid to the defendant, who claims the same as the flag officer's eighth part mentioned in his Majesty's proclamations respecting prize money; but which eighth the plaintiff seeks to recover in this action, or such part thereof as the Court shall think him entitled to. It was agreed in the case, that the several proclamations which had from time to time been made by his present and his late Majesty relative to the distribution of prize money might be read, as if the same were inserted in the case. And the question made for the opinion of the Court [267] was,

1803.

Lord KEITH *against* PRINGLE.

was, Whether the plaintiff were entitled to recover the 1-8th part of the prize money or any part thereof: if he were, the verdict to stand, and the damages to be entered accordingly: if not, then a verdict to be entered for the defendant.

This case was argued in last *Easter* term by *Jervis* for the plaintiff, and *Dampier* contrà: but as the arguments turned upon the same general topics as in the last case of Lord *Nelson*
[268] v. *Tucker*, applied to the special wording of the orders and instructions set forth in this case, it is unnecessary to detail them.

Lord ELLENBOROUGH C. J., at the conclusion of the argument, said, that as the case of Lord *Nelson* and *Tucker*, which stood for argument in the paper (*a*), involved many of the points then in discussion, the Court would not give judgment in this case till after they had heard the other argued. And now in this term, immediately after the judgment pronounced in the last reported case of Lord *Nelson* v. *Tucker*, his Lordship proceeded to give judgment in this case. After stating the facts;

The question which this case involves has been already in effect decided by us in the judgment we have lately given in the case of Lord *Nelson* v. *Tucker*, upon a writ of error from the Court of Common Pleas. The present question in substance is, Whether an inferior flag officer, upon whom the command of a fleet had *devolved;* (for I think it is to be taken rather as the case of a command attaching by devolution, than as one created by express designation and appointment,) by the returning home of his superior flag officer, without any intention when he quitted of resuming the office of commander in chief, be entitled to retain the 1-8th share of prize money received by him in respect of captures made after the superior flag officer had passed the limits of his station on his return home? Or, rather (which is enough for the purpose of the present case), Whether the superior flag officer who has so returned be entitled to recover that share from the inferior flag officer who has received it? The present is a still stronger
[269] case in favour of the right of the inferior flag officer, upon whom the command had devolved, than the one we have just

(*a*) The case of Lord *Nelson* v. *Tucker*, *ante*, p. 238. was not argued till last *Trinity* term.

determined;

1803.

Lord KEITH *against* PRINGLE.

determined; because it is not embarrassed by any arguments to be drawn from what may be supposed to have been decided in the case of the *Saint Anne* (a). But it is not even necessary to determine in this case, whether the inferior flag officer be entitled; it being sufficient for the decision of the case before us, if the plaintiff shall appear not to be entitled. And as he is admitted, to have been a chief flag officer returning home from the station of his command, *without any intention of returning to resume his command*, the question is reduced to the single point, Whether the command of Admiral *Pringle* were "*another command* (b)," so as to perfect that event or condition upon which, by the 4th article of the proclamation, the right of the returning commander is made to determine? And upon that point, for the reasons so recently given, we are of opinion that the command of Admiral *Pringle* was "*another command*," within the meaning of the 4th article of the proclamation, so as to determine the antecedent right of sharing in Lord *Keith*. To hold otherwise, would be to recognize a right in the departing commander in chief so to mould and fashion his command on the eve of his departure, as either to reserve a part of the ships under his own nominal command up to a given period, with all the benefits eventually arising from such command, exclusive of his successor, or though his command should be in fact determined in respect to them, to postpone the period at which that of his successor should commence, so as to obviate in his own favour the literal effect of the words, "*left behind to act under another command.*" But no contrivances of this sort, if any such should ever be attempted, [270] (which cannot be supposed to have been the case in the present instance,) can be effectual to deprive a successor of the advantages incident to his command. In the same moment, in which the effective command of the actually returning commander ends, does that of the succeeding flag officer, either by devolution or commission, begin, with all its necessarily attendant rights and advantages. The preceding commander cannot by his own mere authority continue in his own person, or erect in the persons of any of his captains, a species of command independent of that of the succeeding commander of the station, and exempt from his direction and control. And the

(a) 3 *Rob.* 60. (b) *Vide* the words of the proclamation, *ante*, 247.

peculiar

1803.

Lord Keith *against* Pringle.

peculiar turn of expression used in this case in the letters of the departing commander, which might be supposed to have this import, can properly be considered as intimating only Lord *Keith*'s own opinion that the ships detached under Captain *Losack* would not be under the command of Admiral *Pringle* till they had returned from that service to *the Cape of Good Hope;* but cannot without a manifest and destructive inversion of the rules of the service, and a perversion of the true sense of the proclamation in this particular, be allowed to have the effect contended for upon the part of the plaintiff." We are of opinion therefore that the verdict ought in this case to be entered for the defendant.

Postea to the Defendant.

Monday, Nov. 14th.

*Doe, on the Demise of Robert Reay, *against* Huntington and Others.

Where the lord of a customary manor, by his deed, made since the statute of quia emptores, granted to his customary tenant, who then held by the payment of certain customary rents and other services, that in consideration of a 61 penny fine (or 61 years rent), he the lord *ratified and confirmed* to the tenant and his heirs *all his customary and tenant-right estate*, with the appurtenances, &c. and granted that the tenant and his heirs should be thereof *freed, acquitted, exempted, and discharged from the payment of all rents, fines, heriots, &c. dues, customs, services, and demands,* at any time thereafter happening *to become due* in respect of the tenancy, *except* 1d. yearly rent, and also *excepting and reserving* suit of court, with the service incident thereto; *and saving and reserving* all royalties, escheats, and forfeitures, and all other advantages and emoluments belonging to the seigniory, so as not to prejudice the *immunities* thereby granted to the tenant; and also granted liberty to cut timber, and to sell or lease, &c. without licence: held that such *confirmation* to the tenant of his customary and tenantright estate freed, &c. from all rents and services, except, &c. was tantamount to a release of those rents and services not specifically excepted; and that by virtue thereof the customary tenement became frank-free, or held in free and common socage; and that the old customary estate, which before was not deviseable, was extinguished, and became thereupon deviseable by the statute of wills. Such customary estates, which are peculiar to the north of *England,* are not freehold, but seem to fall under the same general consideration as copyholds, though alienable by bargain and sale and admittance thereon, and not holden at the will of the lord.

At the trial of this ejectment for a certain tenement called *Cardulees*, with the appurtenances, in the manor of *Parton Micklewhaite, Neelehouse*, and *Cardulees*, in the parish of *Dalston* in the county of *Cumberland*, before *Chambre* J., at the last assizes for that county, a verdict was found for the lessor of the plaintiff, subject to the opinion of this Court on the following case.

1803.

DOE d. REAY *against* HUNTINGTON.

From time immemorial, until the execution of the indenture hereinafter next mentioned, the tenement in question was one of the customary or tenant-right estates, holden of the lord of the said manor by the payment of certain ancient customary rents and other services, descendable from ancestor to heir, according to a customary mode differing in some respects from the rule of descents at common law, and not deviseable by will, either directly, or by means of a will and surrender to the use of the same. An indenture was made and executed the 30th of *August*, in the 24th of *Cha.* 2d, between *George Denton*, then lord of the said manor, on the one part, and *Thomas Donnald*, then tenant of the said customary tenement, of the other part; which indenture is as follows, viz. This indenture made the 30th of *August*, 24 *Car.* 2. between *G. Denton* of *Cardue* in the county of *Cumberland* Esq. on the one part, and *T. Donnald* of *Cardulees* in the said county, his tenant, on the other part: Whereas the said *T. Donnald* and divers other customary tenants, their respective ancestors and predecessors, within the said manor of *Parton*, *Micklewhaite*, *Neelehouse* and *Cardulees* in the said county, do hold and have holden their several customary messuages and tenements, with the appurtenances, of the said *G. Denton*, his ancestors, &c. lords of the said manor, by the payment of several and respective ancient customary yearly rents and other services; now he *G. Denton*, for divers good considerations, &c., and especially for and in consideration of a sixty and one penny fine, or threescore and one years' rent paid by *T. Donnald* unto *G. Denton*, of which said sum, &c. *G. Denton* doth hereby acquit, exonerate, and discharge *T. Donnald*, his heirs, &c. that is to say, *T. Donnald*, of the annual or yearly rent of 10*s.* 4*d.*, which amounts to 31*l.* 10*s.* 4*d.*, hath bargained, granted, covenanted, and agreed to and with *T. Donnald*, and *G. Denton* doth by these presents for him, his heirs, &c. bargain, covenant, grant, and agree to and with *T. Donnald*, his heirs, &c. respectively as follows; viz. that *G. Denton*, for the valuable consideration before mentioned, doth for himself, his heirs, &c. for ever hereafter *ratify and confirm* unto *T. Donnald*, his heirs, &c. all that his *customary or tenant-right estate*, with all and every the appurtenances, as liberty of common, and pasture, and turbary, with all other privileges formerly used, &c. by him and other tenants situate within the fields and territories of *Cardulees* aforesaid. And *G. Denton* doth further bargain, covenant,

[272]

1803.

Doe d. Reay against Huntington.

covenant, grant, and agree for him, his heirs, &c. upon the said consideration, that *T. Donnald*, his heirs, &c. shall be for ever hereafter *freed, acquitted, exempted, and* * *discharged of and from the payment of all rents, fines, heriots, carriages, boon days, dues, duties, customs, services, and demands whatsoever, which may at any time hereafter happen to become due in respect of or by reason of the tenancy of* T. Donnald, his heirs, &c.; (except only one penny yearly rent) to be paid to *G. Denton*, his heirs, &c. lord or lords of the said manor, to be paid every 11th of *November* yearly; and also *excepting and reserving suit of court, with the service incident thereunto*, at every court to be yearly holden for the said manor, and due notice thereof given. The indenture then contained a covenant (*a*) for the absolute title of the grantor, and for the quiet enjoyment of the grantee, freely quitted, and sufficiently discharged, exempted, acquitted, and saved harmless, of and from all gifts, grants, &c. and from all incumbrances whatsoever, that may at any time hereafter arise, or be pretended to arise, and grow due by reason of any default or neglect of the payment or performance of any dues or duties whatsoever, (one penny rent and suit of court only excepted as aforesaid;) he *G. Denton saving and reserving* to himself, his heirs, &c. *all royalties, escheats, and forfeitures* for felonies or any other capital crimes, and *all other advantages and emoluments belonging to the seigniory, so far as may consist with, and not be prejudicial to the aforesaid immunities* hereby granted or intended to be granted to *Thomas Donnald*, his heirs, &c. And *G. Denton*, for himself, his heirs, &c. doth hereby further covenant, grant, and agree to and with *T. Donnald*, his heirs, &c. that he, *T. Donnald*, his heirs, &c. may have free *liberty and licence to cut timber, wood, or other woods* stand-

*[273]

[274]

ing, growing, increasing, and renewing upon his own tenement, to his own use, and *for digging of stones* within the said manor, at their will and pleasure, for building or repairing his own dwelling-house, or his outhouses, walls, or fences. And *G. Denton* doth further, for himself, his heirs, &c. covenant and agree, &c. that it shall and may be lawful at any time hereafter for *T. Donnald*, his heirs, &c. respectively to bargain, *sell, alien, mortgage, or lease forth* his said tenement, or any part thereof *without the licence or consent* of *G. Denton*, his heirs,

(*a*) This and other like covenants after mentioned were stated at large in the case; but nothing turned in argument upon the particular wording of them.

&c.

1803.

DOE d. REAY *against* HUNTINGTON.

&c., or without any rent, fine or grasson thereupon to be paid to *G. Denton* his heirs, &c. (except the said penny rent as aforesaid.) There were also covenants for general warranty, and further assurance, &c. A court-book was produced in evidence, beginning with the following title: "Customary court baron and court of dismission, 6th *April* 1738." Then follows a list of freeholders in *Parton*; a list of customary tenants in *Parton Inmire*, at the will of the lord; a list of customary tenants in *Parton Outmire*, at the will of the lord; a list of the freeholders in *Micklewhaite*; a list of customary tenants in *Micklewhaite*; a list of freeholders in *Neelehouse*; a list of freeholders by indenture in *Cardewlees*. The first in the list is *John Donnald*. By indentures of lease and release, bearing date respectively the 19th and 20th of *June* 1745, *John Donnald* grants, releases and conveys the premises (amongst others) to *Robert Bleamire* in fee, by way of mortgage, for securing 200*l*. and interest. The said *John Donnald* by indenture with livery of seisin made on the 6th of *August* 1757 between himself of the one part, and *John Wetherall* of the other part, granted, conveyed, released, and surrendered, &c. to *J. Wetherall*, his heirs, &c. the tenement aforesaid, together with, &c. habendum to him, his heirs, &c. to the use of himself in fee, to hold the same of the capital lord of the fee thereof, by payment of the yearly apportioned rent of one penny, and performance of suit of court with the service incident thereunto. [275] And in which indenture are contained similar covenants, as in the conveyance from *G. Denton* to *T. Donnald*, for general warranty of title, (subject only to the mortgage to *Bleamire*), and also for good title to convey, and for quiet enjoyment, free from any jointure, dower, or thirds had or claimed by *Mary* the wife of *John Donnald* out of the premises thereby granted and conveyed, and free from all other incumbrances except the said mortgage to *Bleamire*, and the yearly appointed rent and suit of court, with the service incident thereunto, to the lord of the said manor, and also a covenant in the usual terms for further assurance. By indenture of the same date between the said *John Donnald* of the one part, and the said *John Wetherall* of the other part, *J. Donnald* demises certain other premises at *Cardewlees*, to *J. Wetherall* for a term of 500 years, to indemnify him and his heirs against the jointure, dower, or thirds of *Mary* the wife of the said *John Donnald*. After the death of the said *John Donnald*, his widow received from

1803.

DOE d. REAY *against* HUNTINGTON.

Wetherall 8*l.*, being one-third of the rents of the premises, as her dower or thirds for about 12 years. There is in the said court-book of the said manor an entry of a court held for the said manor the 6th of *September* 1759, where *Donnald's* name appears; and in which, (inter alia) is the following entry: "We also find and present *John Wedderall*, purchaser of "*John Donnald* of *Cardewlees*, one messuage and tenement of "the yearly free rent of one penny." Then follow several formal admissions of tenants in *Parton Inmire* and *Parton Outmire*. There is no formal admission of *John Wetherall*: the only other entry of that court being what is contained in the

[276] following one: "*Cardewlees* tenants customary by indenture but not fineable (a). *John Wedderall* for part of *John Donnalds* 1*d.* *Andrew Siddon* for part of ditto ½. *John Donnalds* ½." The steward of the court explained the letter (a) to mean *appeared.* *John Wetherall died seised* of the said tenement in 1797, leaving the lessor of the plaintiff his heir both at law and by the custom of the said manor; but having in 1793, by his will duly executed for the passing of real estates, devised away the said tenement from the said heir to the defendants. The customary mode of conveyance of customary estates within the manor is by bargain and sale, and admittance granted thereon by the lord to the customary tenant. The customary dower or widow-right in customary estates within this manor is—(*a*). The question reserved for the opinion of the Court was, Whether the plaintiff were entitled to recover? If he were, the verdict was to stand; otherwise a verdict to be entered for the defendants.

This case was first argued in *Hilary* term last, when at the close of the argument an objection was started by the defendant's counsel, that this being claimed by the lessor of the plaintiff, the heir, as a *customary estate*, it was incumbent on him to shew not only a customary conveyance to his ancestor *John Wetherall* by bargain and sale, (instead of the common law conveyance by lease and release,) but also *an admission* of him by the lord; and that though it were contended in argument by the counsel of the lessor of the plaintiff that the entries stated in the case were sufficient to warrant a presumption of an admission, yet as it was expressly stated that there was

(*a*) A blank was left here in the case.

no

1803.

DOE d. REAY *against* HUNTINGTON.

no formal admission of *John Wetherall*, it should have been left to the jury to draw the conclusion whether or not he had been admitted. To this it was answered, that that point was *not disputed at the trial; it having been taken for granted there, after some discussion, that there was sufficient evidence for the jury to presume an admission. In corroboration of which it was stated as a fact in the case that *John Wetherall died seised*. And the defendants themselves deduced title to him as tenant under the deed of 24 *Car*. 2. and subsequent conveyance. And the Court, upon reference to Mr. Justice *Chambre* as to the fact, received for answer that the learned Judge finding *John Wetherall's* name put down in the court entries as *appearing*, &c. as *tenant*, he had considered it as sufficient evidence of his admission, and that no question was afterwards made on that point. Upon the principal question, *[277]

Raincock, for the lessor of the plaintiff, (the heir at law and by the custom,) contended that the estate in dispute was not deviseable. It appears that the premises were from time immemorial one of the customar yor tenant-right estates holden of the lord of a manor in *Cumberland* by ancient customary rents and other services, descendible by a customary mode different from the common law rule of descent, and *not deviseable by will*, either directly, or by a surrender to the use of a will. The question then is, Whether such an alteration were worked in the nature of the estate by the deed of the 24 *Car*. 2 as to enfranchise it and make it deviseable? But the only effect of that deed was by means of *covenants*, binding indeed upon the lord and his heirs, and running with the land, to compound for the payment by the tenant of certain parts of the rents, and for the performance of certain burthensome services, but *excepting* to the lord the remainder, according to and by virtue of the ancient tenure. Upon a view of the whole instrument, it appears that the lord did not intend to enfranchise the estate; and as no new tenure could be created at that time, nor since the statute of quia emptores (*a*), such intention can only be carried into effect by holding that for all other purposes than the rents and services covenanted to be released by the lord, the ancient tenure and customs remained. The lord might have enfran- [278]

(*a*) *Westm*. 3. or 18 *Ed*. 1. c. 1.

1803.

Doe d. Reay *against* Huntington.

chised it by grant of the freehold to the tenant, and severance from the manor: he might have parted with every thing which sounded in tenure: but here in the first instance he *ratifies* and *confirms* to *T. Donnald* his *customary* or *tenant-right* estate. All that the tenant has therefore in the first instance is in terms of *confirmation* and *ratification* of the old tenure, and not of enfranchisement of it, nor by way of creation or grant of any new estate; which shews an intent to preserve and not to destroy the old customary estate. Words of confirmation may indeed in some cases enure beyond a mere confirmation of that which existed before, if there be an express intent appearing to grant more: but here the contrary is to be collected from the other parts of the deed. And then again, where the tenant is *freed, acquitted, exempted, and discharged* from the payment of rents and services, it is with an *exception* of one penny yearly rent, and with an *exception* and *reservation* of *suit of court*, with the *service incident thereto*. And even the payments, &c. of which the tenant was to be *freed*, &c. are expressed in terms relative of his future holding as tenant, viz. of such "as may at any time *hereafter happen to become due in respect of or by reason of the* TENANCY of him the said *T. D.*;" which shews that even those things were contemplated as capable of becoming due, and therefore an exoneration of the tenant from them is provided to operate in future as they become due. All the expressions shew plainly an intent

[279] that the tenant was to remain in of his old estate, abridged indeed with respect to the quantum, but not as to the nature of the ancient rent and services; for the one penny yearly rent and suit of court, &c. are *excepted* and *reserved* out of the clause of discharge: so much therefore of the rent and services as were so excepted and reserved, remained upon the ancient footing, and are claimable only as remnants of the customary estate of which they are part. There is however a distinction between an exception and a reservation. *Exception* (says Lord *Coke*) is every part of the thing granted, and of a thing in esse at the time; the thing excepted is always part of the old estate; but *reservation* is ambiguous, and may either be taken in the proper sense of the word *exception*, or as a reservation of something out of that which is newly created. *Co. Lit.* 47. *a.* 142. *b.* 143. *a.* *Perkins*, ch. 10. *Reservations*, § 625. *Revell* v. *Jodrell* (a). Now here the word *except* is alone applied to

(a) 2 *Term Rep.* 415.

the

1803.

DOE d. REAY *against* HUNTINGTON.

the rent; and both *excepted* and *reserved* being applied to the suit of Court and the service incident to it, the former, which is never used but in one sense, must control the latter, which is ambiguous. In the year-book 21 *Ed.* 4. 60. *a.* 62. and *Bro. Reservation*, 36. S. C. (*Bro. Abr. Tenure*, pl. 40. cites the same case by mistake as of 21 *Hen.* 4.) where the question arose upon the construction of a grant made in the time of *Hen.* 3. before the statute of Quia Emptores (*a*), whereby the prior of *Bingham* held of the prior of *Merton* a certain tenement, rendering 5 marks and 5*s.* pro omni servitio sectæ curiæ, &c. ad prædictum priorem de *M.* &c. pertinente; et quod faciat capitalibus dominis feodi illius prædicto Priore de *M.* &c. omnia alia servitia ad præditum tenementum pertinentia. The great question was, Whether the old tenure were extinguished? [280] Whether this were rent-service, or a dry rent or annuity. The case was long pending, and a writ of error was brought in the 2 *Rich.* 3., but it does not appear what became of it. But *Bryan* C. J. held in *C. B.* that it was no longer rent-service; and he said, "Where the lord confirms the estate of his tenant rendering 1*d.* for all services, I deny that it is parcel of the ancient seignory; and I take this distinction betwen *reddend.* and *tenend.*; for *reddend.* includes not tenure in any manner, and *tenend.* always includes tenure. For if the lord confirm the estate of his tenant *reddend.* or *solvend.* so much for all manner of services, the services are extinct, and the rent is not rent-service: but if he confirm the estate of his tenant *reservand.* or *tenend.* by so much for all services, it is parcel of the ancient services. Or if he say *reservando* so much, in those cases the seignory remains. *Brook* indeed puts a quære in his Abridgment. But whatever doubt there might be upon the word *reserved*, here the rent and suit are expressly *excepted;* and therefore by all the authorities the old customary estate continued. There might be a reason for compounding for the personal services of the tenant. Customary suitors of court differ from freehold suitors. In many customary manors the tenants must do their services in person, but a freeholder may perform his by attorney. So a copyholder, though he may essoign, yet he cannot do suit by attorney, but only in person. Sir *John Braunche*'s case (*b*), 2 *Com. Dig. Copyhold*, G. 8. 1 *Roll. Abr.* 505. 6 *Vin. Abr.* 129. *Copyhold*, N. c. Here the

(*a*) 18 *Ed.* 1. c. 1.

(*b*) 1 *Leon.* 104.

1803.

Doe d. Reay against Huntington.

freehold is in the lord, according to *Stephenson* v. *Hill* (a): and the known methods of enfranchising these customary estates are by escheat, by extinction of the seignory, and by feoffment of the soil, *whereby the tenant holds immediately of the superior lord, which he cannot be said to do where the ancient suit of court is retained. The exception then of the suit of court is an exception of so important a part of the tenure that the freehold cannot be considered as conveyed to the tenant. Again, the lord reserved to himself "*all royalties, escheats, and forfeitures,* &c. belonging to the seignory." But if the freehold passed to the tenant, the escheats would be different, according as the mode of descent was altered, which would have the effect of creating a new tenure: whereas the intent could only be to reserve these royalties, escheats, &c. as they would arise on the estate descendible by the custom: and the power of making a will deprives the lord of a chance of escheat. There may also be circumstances creating a forfeiture by the custom, which would make no forfeiture at common law. Again, the very circumstance of the lord granting "free *liberty* and *licence* to cut *timber*," &c. upon the tenement, shews that the freehold was not meant to pass by the deed: for otherwise that provision was superfluous; and the *right* of cutting timber is inconsistent with a claim to cut it by *liberty and licence*. The same observation applies to the power granted to *alien* or *lease* without licence from the lord. The reservation of "all royal- "ties, &c. and all other emoluments and advantages belonging "to the seignory," was also made so far only as was consistent with "the aforesaid *immunities*" thereby granted to the tenant; which denomination of the objects of the grant is inconsistent with the notion of an entire grant of the *freehold*. And there might be reasons even for the tenant's preferring such a customary estate as this, excused from the personal services, to an estate of freehold; because the tenure would exempt him from attendance on the county courts. But even if this were no longer the old customary estate as between the lord and tenant, yet the collateral customs as to strangers might still remain; as in *Wiseman* v. *Cotton* (b), where lands in *Kent* disgavelled by act of parliament were yet holden devise-

*[281]

[282]

(a) 3 *Burr.* 1278.

(b) 1 *Sid.* 135. 1 *Lev.* 79. But note that three of the Judges held that the custom of devise was itself collateral to the custom of gavelkind.

able

1803.

DOE d. REAY *against* HUNTINGTON.

able by the custom. So in a case in the year book, 49 *Ed.* 3. 7. where lands formerly holden in ancient demesne were granted by the lord to the tenant to hold the same per servitio of 17*s.* pro omnibus servitiis, &c. ad communem legem, &c. *Kerton* J. said, "It may be that by usage within a certain manor of ancient demesne, the youngest son is inheritable to the land which is holden by the customs of the manor and tallages and other bond services; I say, that even though the lord of the manor should release to the tenant all his right, so that he has lost his seignory by so much, or that he confirms to hold by less services, as he has done here; I say, that thereby the nature of the tenancy is not changed, having regard to the inheritance of the tenancy as against the heir; for the younger son shall have the land as he had before, and not the elder: nevertheless, as to the lord who released, having regard to his seignory, the tenancy is changed, so that the tenant shall not be amenable in his court, by the custom of the manor, but in another court, as his court baron, by writ of right patent the land shall be demanded; because he is his tenant where parcel of the services are saved by the deed, as here." So here, the customary incapacity of devising would remain, though as between the lord and tenant the customary tenure were gone. There are several cases in the year-books upon grants made [283] before the statute of quia emptores (*a*); but they are not material; because the lord might then create a new tenure by his grant, and the tenant would hold as of a new grant of a manor. But there is no case where the tenure has been deemed to be altered, where so many of the badges of it were preserved as here, particularly the suit of court and service incident thereto.

Wood contrà. The deed of the 24 *Car.* 2. operated as a complete extinguishment of the customary tenure, and the tenant thereby acquired the freehold, with all incidents to such an estate. There is no ground for presuming that an enfranchisement was not intended; for a large pecuniary consideration was paid by the tenant, amounting to sixty-one years' purchase upon the ancient rent, a sum which, considering that the tenant had before a descendible estate, would

(*a*) *Lawrence* J. afterwards referred to 1 *Rol. Abr.* 325., where some of these cases are collected, and also to *Bro. Ancient Demesne*, pl. 18.

1803.

Doe d. Reay against Huntington.

not have been given for less than the fee simple. It is not disputed but that if the lord grant the freehold to a customary or copyhold tenant, it destroys the tenure; as in *Parker* v. *Turner* (a), which was so much the stronger case, as the purchase of the freehold by a copyholder tenant in tail was holden to extinguish his estate tail. And these customary tenures were in their origin more in nature of military tenures, and are properly descendible and deviseable, without a special custom to control those qualities. Then by *confirmation* to the tenant and his heirs of the estate, the fee simple passed to him from the lord. *Confirmation* is in *Co. Litt.* 295. *b.* defined to be "a conveyance of an estate or right in esse, whereby a voidable estate is made sure and unavoidable, or whereby a

[284]

particular estate is increased." So here, the effect of the confirmation of the estate to the tenant and his heirs was to give him the fee simple; for in no other way could it enlarge his estate than by extinguishing the lesser or customary estate. [*Lawrence* J. asked, whether the tenant of such a customary estate might not have the fee and inheritance in him, though the freehold were in the lord: and *Wood* answering in the negative, and comparing this to the case of a copyholder who has not the fee, though he might have an estate of inheritance according to the custom; *Lawrence* J. observed, that the grant of the fee to a copyholder must necessarily destroy the tenure, because he could no longer hold at the will of the lord: but that the tenant of a customary estate might have a *freehold interest*, though not a *freehold tenure* in it, according to Mr. Justice *Blackstone*'s distinction in his tract on Copyholders (b).] It appears that the lord was entitled to all the timber, &c. growing on the estate, and to the soil under the surface: the tenant therefore was entitled to no more than the possession and use of the land. It is true the lord has reserved some of the ancient services; but that cannot make a difference in the tenure; for if the freehold be granted by the lord to the tenant, the tenure is necessarily extinguished by operation of law. And though it might be a question whether some of the services reserved could take effect after such extinguishment, still the grant of the freehold would be good.

(a) 1 *Vern.* 393.

(b) "*Considerations on Copyholders*," p. 109, &c. and vide 1 *Cruise's Dig. of the Law of real Property*, p. 10.

First,

First, the reservation of the ancient rent is insisted upon; but that is not inconsistent with the grant of the freehold; for though a lord cannot now create new services, yet he may continue the old ones, notwithstanding the estate is converted * into freehold; for he might have conveyed the particular rent in fee to another before he enfranchised the estate. Next, the reservation of the suit of court is relied on, which was part of the ancient tenure. But whether that were reservable or not, it would not operate to defeat the rest of the grant made upon a valuable consideration. It is not so clear what is meant by the reservation of all *royalties*: but if a lord having a free warren grant the estate without granting the free warren in express terms, that would be reserved. But it should seem that the *escheats* could not be reserved, because when the customary line of descent was broken by the enfranchisement it would operate as a new tenure. Then as to the grant of the *timber*, it is true that was not necessary after passing the freehold; but the deed goes on further to grant rights of common of turbary and pasture, and a liberty of digging stones *within the manor*, which would not have passed without an express grant. But it is nothing unusual in conveyances to include many superfluous words and provisions, which will apply to other parts of the deed as well, such as the power to alien, &c. The other covenants of general warranty further assurance, and for quiet enjoyment, are such as are usually inserted in every conveyance of the fee simple, and are here made in as large words of grant as are ever used. But it is contended, that supposing the freehold were conveyed to the tenant, still it would not be deviseable, and a case of a gavelkind was referred to: but that was a conveyance from one tenant to another, and the question turned upon the intention of the Legislature in the disgavelling act; whereas this is a conveyance from the lord of all his right, with certain exceptions, to the tenant; and as the lord had the fee simple, subject only to the customary tenant-right estate, and he might have devised his estate subject to that incumbrance; so the tenant, who has now the estate of freehold which the lord had before, must have the same power of devising which the lord himself had. At any rate, the lessor of the plaintiff, who claims this as a customary estate, must deduce title through his ancestor according to the custom. But it is found, that the customary mode of conveyance is by bargain and sale, and admittance; and that *John Wetherall*, from whom the lessor

1803.

DOE d. REAY *against* HUNTINGTON.

*[285]

[286]

1803. lessor claims, only derived title by a common law conveyance by indenture and livery of seisin: and consequently the lessor cannot have a greater or better estate, as customary tenant, than his ancestor.

DOE d. REAY *against* HUNTINGTON.

Raincock in reply said, that it was enough that *John Wetherall*, from whom both parties claimed, was enrolled in the court books as tenant, and was stated in the case to have died seised; and that however the lord might have taken advantage in the first instance of any irregularity in his title, yet it was not competent for any other to do so: and the lord himself would be estopped after admission (*a*), or after acceptance of rent with notice of the conveyance, which would amount to an admission. *Com. Dig.* tit. *Copyhold*. Then as to the existence of the old tenure, all the ancient services and rent still exist in point of law, though the lord and his heirs are by his covenant estopped from insisting on those which he covenanted to free and acquit the tenant of as they became due. They are stated as *immunities* granted by the lord, but the important parts of the tenure are the suit of court and service incident thereto, the escheats, and forfeitures; and all these are preserved by exceptions in the grant. These can only be *customary* duties; for they could not be created anew at the time of the grant: but the *immunities* granted are *conventionary*. [Lord *Ellenborough* C. J. That is the difficulty. Does not the customary estate consist of *all* the services? And does not the release of some of them destroy the identity as it were of the customary estate, there seems enough reserved to make it a customary tenement, if the customary services may be reserved by parcels.] If it be plain that the lord did not mean to grant those things which he has expressly reserved, and it appears now that he could not grant part without giving up the rest which he meant to reserve, then the deed is altogether inoperative, being founded on a professed consideration which cannot avail in law, namely, the severance of services, which cannot be severed. And if the deed were to be construed as amounting to a renunciation by the lord of the whole seignory, so as to create a fee, that would in effect be creating a new tenure, because then the estate would be holden immediately of the lord paramount. And nothing can be argued from the

[287]

(*a*) This was after the fact reported by Mr. Justice *Chambre* to the Court, *ante*, 277.

amount

amount of the purchase-money as to the intention of the lord to grant the freehold; for the sum was estimated upon the value of the customary rent only; but much more was granted, such as the timber, &c. 1803. — DOE d. REAY *against* HUNTINGTON.

Curia adv. vult.

Lord ELLENBOROUGH C. J. now delivered the judgment of the Court. The first question which appears to arise upon this case is, Under what description or class of tenure did this customary tenement properly range itself before the execution of the indentures of the 30th *August*, 24 *Car.* 2.? The second is, What has been the effect of that indenture thereupon, so far as respects the right of the tenant to devise the same by will? [288] Since the stat. 12 *Car.* 2. *c.* 24., which takes away tenures by knight's service, it must be either held in free and common soccage, or in frank almoign, or in grand serjeanty, by such part of the honorary services of that tenure as are by that statute retained, or by copy of court roll. The consideration of the second and third species of tenure, i. e. tenure in frank almoign, and by such services of grand serjeanty as are by that statute saved, may be laid wholly out of the question, as there is no pretence for considering this tenement as being of either of those two descriptions of tenures. It must therefore be either holden in free and common soccage, or by copy of court roll. If it be of the first description, that is to say holden in free and common soccage, it is clearly deviseable by the direct terms and operation of the statute of wills, 32 *H.* 8. *c.* 1. These customary estates, known by the denomination of *tenant-right*, are peculiar to the northern parts of *England*, in which border-services against *Scotland* were anciently performed, before the union of *England* and *Scotland* under the same sovereign. And although these appear to have many qualities and incidents which do not properly and ordinarily belong to villenage tenure either pure or privileged, (and out of one or other of these species of villenage all copyhold is derived,) and also have some which favour more of military tenure by *escuage uncertain*, which, according to *Littleton*, sect. 99., is *knight's service;* and although they seem to want some of the characteristic qualities and circumstances which are considered as distinguishing this species of tenure, viz. the being holden at the will of the lord, and also the usual evidence of title by copy of court roll, and are alienable also, contrary

1803.

Doe d. Reay *against* Huntington.

[*289]

contrary to the usual mode by which copyholds are aliened, viz. by deed and admittance thereon (if indeed they could be immemorially * aliened at all by the particular species of deed stated in the case, viz. a bargain and sale, which at common law could only have transferred the use); I say, notwithstanding all these anomalous circumstances, it seems to be now so far settled in courts of law that these customary tenant-right estates are not freehold, but that they in effect fall within the same consideration as copyholds, that the quality of their tenure in this respect cannot properly any longer be drawn into question. In the case of *Stephenson* v. *Hall*, 3 *Burr.* 1278. Lord *Mansfield* and Mr. Just. *Dennison* considered it to be a settled point, that in the case of customary estates "the freehold was in the lord." And in the very late case of *Burrell* v. *Dodd*, 3 *Bos. & Pull.* 378. the Court of Common Pleas expressly held these customary tenant-right estates not to be freeholds. Assuming therefore that these estates were prior to the execution of the indenture of the 24 *Car.* 2. holden by copy of court roll, within the enlarged sense of those words as they occur in the stat. of the 12 *Car.* 2. (and the contrary has not been even insinuated in argument by the counsel on either side), we are of opinion that by virtue of the indenture of the 24 *Car.* 2. operating upon that species of tenure, the tenement in question has become frank fee; or in other words, land holden in free and common soccage, and of course, under that description and character, deviseable by the statute of wills.

To *confirm* to the tenant his customary and tenant-right estate, *freed, acquitted, and discharged from the payment of all rents and services, &c., except* the one penny rent which is reserved or retained out of the old rent, is tantamount to a release of those rents, services, &c. which are not so specifically excepted

[290]

and restrained; for "where (*a*) words are equivalent in substance to words of release, the law takes them as a release," and "where there are words of substance, the law appoints how they shall enure." And taking these words of acquittance, exemption and discharge on the part of the lord as operating in substance a release of the services specified, and assuming that there is no material difference between the tenure in question, and that of ancient demesne for this purpose, and to which species of tenure it bears the strongest analogy, the following case is an authority in point, to shew that the customary quali-

(*a*) *Plowden*, 140.

ties

1803.

DOE d. REAY *against* HUNTINGTON.

ties of this tenure were extinguished by the deed. In the case of *Griffith* v. *Clarke*, *Moore*, 143. *Mich.* 25 & 26 *Eliz. Rot.* 625. "Deceit by *Griffith* v. *Clarke* and others, upon a fine levied of land in antient demesne in *Alderwaste*, of which *Griffith* was lord. The defendants pleaded a release by fine of the lord of the manor to one who was tenant of the land of which the fine was levied in the time of *E.* 2. (and of course after (*a*) the stat. of quia emptores in 18 *E.* 1.) which release was "de omnibus servitiis et consuetudinibus, salvis servitiis infra scriptis, viz. pro unâ virgatâ terræ 2*s*. rent sect. curiæ et relevio." And the release was de uno messuagio et unâ virgatâ terræ: and by this release the defendants understand the seignory, as to the antient demesne, to be extinct. And the case was many times argued on this point, viz. *if the release of the services and customs extinguished the custom in antient demesne;* or whether the saving preserved it? And the Court held the custom of antient demesne extinguished by the release: but that the rent, suit of court, and relief continued by the saving, as the remnant of the antient seignory: and so it was adjudged. [291]
And with this agrees what was said by *Belknap* C. J. in the year book, 49 *E.* 3. 7. (a case which was cited in argument by the counsel for the plaintiff on account of what was said by *Kirton* J.) That was a case where one *Thomas Blake* sued a writ of recordare out of antient demesne, because he claimed to hold the tenements at common law by charter of one who was lord of the same manor in antient demesne; upon which *Persay* demanded of the tenant where the deed was, and *Hastings* produced the deed; by which one *Thomas Cleere*, who was lord of the manor, recited, that the said *Thomas Blake* held a messuage and five rods of land in *Werton* of him, in antient demesne, according to the custom of the manor, and granted that he should have the liberties, by these words, "hanc habeat libertatem quod ipse et hæredes sui habeant et teneant prædictum messuagium et 5 virgatas terræ de me at hæredibus meis per servitium 17*s*. *pro omnibus servitiis*, auxiliis, finibus, tallagiis, merchetis, et omnibus aliis secularibus demaundis *ad communem legem*." And the deed was read, which contained *dedi, concessi, et confirmavi*, ut supra, *ad tenendam ad communem*

(*a*) Vide *Watkins on Copyh.* 368, where by mistake the question in this case is supposed to have arisen on an alienation *before* the statute.

legem:

1803.

DOE d. REAY *against* HUNTINGTON.

legem: and the deed was dated in the 45th year; and he used the deed in the nature of a feoffment. *Persay*, for the party suing the replegiare, would have averred that the tenements continued antient demesne, and that the parol should be remanded, and that his client should not be ousted of that averment, because he was a stranger to the deed. But *Belknap* was of opinion that he ought to answer the deed as much as if he had been a party. And after some argument, whether the tenement could become frank fee without express words in the deed to that effect, *Hastings*, counsel for the tenant, said, since by the deed certain rent is reserved to the lord *for all services*
[292] *and customs:* so that by the deed the tenant shall be *discharged of every custom and tallage due to the manor;* and besides the lord had granted by express words to hold at common law, and so out of the nature of antient demesne; wherefore he demanded judgment, and that the writ might abate. *Persay* in answer said, notwithstanding this deed of confirmation the tenant shall hold of the lord as he held before, but not by such quantity (i. e. of rent); for the same land shall be demanded by writ of right in the court of the same lord who confirmed, and only the quantity (i. e. of rent), by the deed is changed into a lesser sum. I say, that the tenure is only changed pro tanto. To which *Belknap* says, "It is true that the lands shall be demandable by writ of right in the court of the lord after this "confirmation, because every writ of right patent shall be "commenced there: but, after the confirmation, the land shall "no longer be demanded by writ of right in antient demesne, "but by *writ of right, according to the custom of the manor:* "*because by the confirmation the land is discharged of all* "*manner of custom of the manor;* and he shall hold *by the* "*services contained in the confirmation.* And I say, that this "tenant shall be aided now by a replegiare against his lord, if "the lord demand more services of him than are comprised in "his confirmation, and shall not be aided by *monstraverunt*, "*because he holds not by custom of the manor;* on which ac-"count it seems clearly *that by the charter it is frank fee:* "wherefore see if you would say any thing else." And although what is afterwards put by *Kirton* Justice seems in part hardly to be reconcileable with what had been before laid down by *Belknap*, yet he agrees so far as to say that, "where the "tenancy is changed he shall not be brought into the court by "custom of the manor, but into another court, as his court "baron;

1803.

DOE d. REAY *against* HUNTINGTON.

" baron; and that the *land shall be demanded by writ of right* " *patent; because the land is holden of him where parcel of the* " *services are saved to him by the deed*, as it is here," And the judgment of the court seems to have been according to what was laid down by *Belknap*; and is in the same sense referred to in *Brooke's Abr.* title *Antient Demesne*, pl. 8. and *Confirmation*, pl. 5.; and is cited in *Co.* 140. (referring to 49 *E.* 3. 7.) in these terms, viz. " If the lord of antient demesne confirms the " estate of the tenant, to hold by certain services ad commu- " nem legem: although the *estate* of the tenant is *not changed*, " nor any transmutation of the possession, *yet the quality of his* " *estate is changed*; for the tenant shall not be afterwards im- " pleaded by petit writ of right close; *and the lord by the con-* " *firmation is discharged from the customs of the manor*." So that it appears upon the whole, that whether the tenement in question were originally in its own proper nature and quality of the description of frank tenure, in which case it would be deviseable by the immediate operation of the statute of wills; or whether it were of a villenage tenure, analogous to antient demesne; still under the operation of the indenture of 24 *Car.* 2. the immediate customs by which this tenement was distinguished from other lands holden in free and common soccage have become extinguished, and the land of course also become deviseable as any other soccage land under the statute of wills is; and consequently that the defendants are as devisees entitled to take it under the devise thereof which has been made to them. The consequence of which is, that the verdict should be entered in favour of them, the defendants.

Postea to the Defendants.

1803.

Monday,
Nov. 14th.

The KING *against* THORNTON.

A charter constitutes a corporation to consist of two bailiffs (senior and junior), 12 aldermen, and an indefinite number of burgesses; and after nominating the two first bailiffs, and directing the election of the first 12 aldermen, provides that on a certain day in the year, the *senior* bailiff shall be chosen by the bailiffs and aldermen, or the major part of them, *out of the aldermen*, for one year, *and until another of the aldermen to that office in due manner should be elected, perfected, and sworn*; and also provides for the election of the *junior* bailiff on the same day, by a different mode of election for one year, *and until*, &c. (as before): held that the *two bailiffs* do not thereby constitute but *one officer*; and that the senior and junior bailiffs of different years, last *legally* appointed, (their respective successors *de facto* for several years having been ousted by quo warrantos) might coalesce together, and preside at a corporate meeting of the bailiffs and aldermen for the election of a senior bailiff. And that the charter having directed the future election of a *senior* bailiff (after the first appointment of *two* bailiffs and *twelve* aldermen) to be made *of one of the aldermen*, must be taken to mean that there should be only *eleven* acting efficient aldermen apart from the senior bailiff, who was also an alderman; and consequently that *six* aldermen were a majority of that integral part capable of making, together with the two last legal bailiffs, an elective assembly for the purpose of choosing a senior bailiff.

THIS was an information in nature of a quo warranto against the defendant, to know by what authority he claimed to exercise the office of senior bailiff of the town of *East Redford* in the county of *Nottingham*: to which the defendant pleaded, That the bailiffs and burgesses of *East Redford* were a body corporate by prescription; and that by a charter of 25th *November*, 5 *Jac.* 1. the King granted that they should be a body corporate by the name of the bailiffs and burgesses of the town of *East Redford*; and that there might be from thenceforth for ever within the said town two of the burgesses to be chosen in the manner therein mentioned, of whom one should be called *senior* bailiff, and the other *junior* bailiff; and that there should be twelve of the burgesses to be chosen in the manner therein mentioned, who should be aldermen of the said town. The charter then named *William Thornton* to be the first senior bailiff, and *Nicholas Watson* to be the first junior bailiff, and directed that they should continue in their offices until the feast of *St. Michael* then next ensuing, *and from thence until two other of the burgesses should be in due manner elected, perfected, and sworn*, according to the provisions after expressed in the same charter. The charter then went on to appoint aldermen for the town thus: That the bailiffs and burgesses of the town for the time being, when to them or the major part of them it should *seem expedient, upon public summons, might assemble, and that the bailiffs and burgesses being so assembled, or the major part of them, might chuse *twelve* of the more honest burgesses to be *aldermen*; which said twelve aldermen so as aforesaid to be elected should take an oath *before the bailiffs* faithfully to execute the office of aldermen,

[*295]

1803.

The KING *against* THORNTON.

man, and after the oath so taken they should bear and execute the office during their natural lives, unless amoved, and should be of the common council of the town, and *assisting to the bailiffs* in all things whatsoever concerning the said town. The charter then directed the mode in future of electing *the two bailiffs*, viz. that *the bailiffs and aldermen* for the time being, or *the major part of them* for the time being, might chuse yearly, on the first *Monday* in *August*, *one of the aldermen* for the time being to be *senior* bailiff, who before his admission to the office should be sworn *before the last bailiffs*, his predecessors, on the feast of *St. Michael*, and after such oath taken he should execute the office of senior bailiff *for one whole year* then next following, *and from thence until one other of the aldermen to that office in due manner should be elected, perfected, and sworn.* The charter then directed the mode of chusing the *junior* bailiff, viz. by the bailiffs and aldermen, or the major part of them, nominating two out of the burgesses, one of whom should be elected by the bailiffs, aldermen, and burgesses, or the greater part of them, who, after he should have been sworn in like manner *before the last bailiffs* of the said town his predecessors, *should be able to execute the office of junior bailiff for one year then next following, and from thence until one other burgess should in due manner be elected, perfected, and sworn.* The charter then provided that in case it should happen that the senior or junior bailiff, or either of them, should die, or be removed from *their office*, at any time within one year after they [296] have as aforesaid been *preferred and sworn* to the office of *senior bailiff*, or *junior bailiff*, then and so often an election should be made of another person or other persons to supply the said office of senior bailiff, or junior bailiff, or either of them so dead or amoved; and that he or they so as aforesaid elected or preferred to the said office or offices of senior bailiff, and junior bailiff, might hold the same office during the residue of the same year; the oath aforesaid being first taken before *the other surviving bailiff and three or more aldermen*, or if both bailiffs should be dead, then before three or more aldermen, and so as often as the case should happen. The plea then set out the election of senior and junior bailiffs from the year 1796 to 1801 inclusive. It then stated proceedings in quo warranto (*a*), and judgment of ouster in 1802 against many of the senior and

(*a*) Vide *Rex* v. *Clarke*, 2 *East*, 75.

1803. junior bailiffs elected during that period; and alleged that thereby one *David Wheelwright*, (who was chosen *senior* bailiff in 1797), and one *Thomas Barker*, (who was chosen *junior* bailiff in 1796), being the last senior and junior bailiffs lawfully chosen, continued lawfully to hold over and exercise their respective offices until the defendant was chosen *senior* bailiff on the 17th of *November* 1802, under a writ of mandamus, at a corporate meeting then holden, at which the said *Wheelwright* and *Barker* presided as senior and junior bailiffs, and at which *six* aldermen met, being, as alleged by the plea, a majority of the bailiffs and aldermen of the said town; there not having been any election of bailiffs on the previous charter-day (the first *Monday* in *August* 1802), owing to a sufficient number of aldermen not attending, nor on the day next after, according to the statute. The plea then stated such election of the defendant to be senior bailiff at such meeting of the two bailiffs of different years so holding over, and of *six* aldermen; and that he was sworn into office before the same bailiffs. There was a second plea, stating an *usage* from the time of granting and accepting the charter, for the bailiffs and *six* or more of the aldermen to meet to elect the *senior* bailiff. To both these pleas the Crown, after setting out another part of the charter of *Jac.* 1. whereby it was granted that the *bailiffs* and *twelve* aldermen for the time being should from time to time be of the common council of the said town, and that the *bailiffs* and *aldermen*, or the major part of *them*, *of whom the bailiffs should be two*, met together, should have full power and authority to make by-laws; demurred generally. In the last term,

The King *against* Thornton.

[297]

Dampier, in support of the demurrer, made two objections to the defendant's title as set forth in the plea; 1st, That there was not a good corporate meeting, to constitute an elective assembly; a majority of the aldermen not being present. 2d, That the bailiffs who presided at such meeting were not proper presiding officers. 1st, By the words of the charter the elective body is to consist of two integral parts, both of which must attend by their majority in order to constitute a good corporate meeting. The two bailiffs are one integral part, both of whom, (unless in case of a vacancy in the office of one of them by death or amoval, which is expressly provided for,) must attend, as one alone would not form a majority: the two make but one officer, and both must preside. *Rex* v.

Smart

1803.

The KING *against* THORNTON.

Smart (*a*); *Rex* v. *Bailiffs, &c. of Ipswich* (*b*), and *Salter* *v. *Grosvenor* (*c*). And for this part of the argument it may be taken, that two bailiffs de facto did attend the election. The aldermen form the other integral part, the majority of which is *seven*. For the corporation, as appears by the charter, properly consists of *twelve* aldermen *besides* the *senior* bailiff, who is also required to be an alderman; for the *twelve* aldermen are expressly appointed to be a common council *assisting* to the *bailiffs;* whereas if the charter had meant that the senior bailiff should be reckoned as one of the twelve aldermen, it would have appointed the common council to consist of the bailiffs and *eleven* aldermen, or at least of the bailiffs and aldermen generally, without referring to the number *twelve*. It would be inconsistent also with the general design of the charter to reckon the senior bailiff as one of the aldermen; for the bailiffs are to preside, and the aldermen to be presided over; each therefore must appear in person, and the number cannot be completed by counting the same person twice in respect of his two official characters. His character of alderman merges pro tempore in the higher office. If a charter direct an act to be done by a mayor and twelve aldermen, it must be understood that a majority of twelve aldermen must be present at the meeting besides the mayor, though he might happen to be an alderman. And this is expressed in effect in that clause of the charter set out in the replication; which, after granting that the *bailiffs* and *twelve* aldermen should be the common council, requires that the *bailiffs* and *aldermen*, (i. e. the 12 aldermen before mentioned) or the *major part of them, of whom the bailiffs should be two*, should meet, and make by-laws: this shews that the *senior* bailiff, though an alderman, was not [299] reckoned in the number of the twelve, during his presidency as a bailiff. Non constat that the first senior bailiff was an alderman; and then *seven* aldermen exclusive of the bailiffs must have attended at the first election to have constituted a majority of the aldermen. The only other construction of the charter, referring the word *them* to the meeting of the major part of the bailiffs and aldermen, considering them as one integral body, would go to shew that a meeting of eight aldermen only, without either of the bailiffs, would be good; which would be

[*298]

(*a*) 4 *Burr.* 2241. (*b*) 2 *Ld. Ray.* 1237. (*c*) 3 *Mod.* 303.

1803.

The King *against* Thornton.

directly contrary to *Rex* v. *Miller* (a), recently confirmed by the Court in *Rex* v. *Morris* (b). It was therefore necessary that both the bailiffs and seven aldermen at least should meet to form a corporate assembly, though the majority of that number when so assembled would be competent to elect; and as *six* of the aldermen only attended at the defendant's election, it was invalid. But supposing *six* aldermen were sufficient to constitute a majority of that body, by excluding the senior bailiff as one of the twelve, yet, 2dly, the persons presiding at the corporate meeting were not competent bailiffs for that purpose: and though the proper persons who might have presided were present at the meeting, yet if they did not in fact preside, it is the same as if they were absent, according to *Rex* v. *Carter* (c), and *Rex* v. *Ellis* (d). This election was not upon a charter day, nor on a vacancy by death or amotion, but by virtue of a mandamus under the stat. 11 *Geo.* 1. *c.* 4. To make the presidency therefore of the acting bailiffs good, they must

[300]

either be the proper officers who ought to have presided on a charter day, or under *s.* 1. and 2. of the act; "the persons having a right to vote, being the nearest then present in place and office to the person or persons so absenting himself or themselves." Now these persons answered neither of those descriptions. It will be contended, that in consequence of the ouster of the intervening bailiffs, the last good bailiffs continued in their office; but no case has gone the length of deciding that annual officers can hold over after an election de facto of persons to succeed them; for after having once relinquished their offices in fact, they cannot resume them again without a new election; and the statute evidently meant only to provide for a case where no election in fact was made on the charter-day. In *Prowse* v. *Foot* (e), it was particularly insisted on in the reasons for sustaining the judgment of the Exchequer Chamber, (and which was affirmed in Dom. Proc.) that no other persons had been elected or sworn in the room of the old officers, who held over. The consequences of a contrary doctrine would be very inconvenient; for if the old officers continued in their offices notwithstanding their relinquishment of them in fact and the election of others, all corporate meetings and judicial acts done by the others as justices of peace virtute officii

(a) 6 *Term Rep.* 268.
(b) *Ante*, 17 and 3 *East*, 213.
(c) *Cowp.* 58.
(d) 2 *Stra.* 994.
(e) 3 *Bro. P.C.* 167.

have

have been coram non judice and void, and the magistrates de facto been guilty of so many trespasses; or if such acts be deemed valid as done by magistrates de facto, then during all the intermediate time from the last good election of bailiffs, there have been more magistrates in the town than were warranted by the charter. The case most like this is one provided for by the charter, where both the bailiffs die, in which case the three senior aldermen are the swearing in officers, and either they or the senior alderman should have presided. [Lord *Ellenborough*, C. J. asked if he could shew any authority to warrant a proceeding by analogy in such a case?] Another objection is, that the senior and junior bailiffs presiding at the election were appointed of different years, and cannot on that account coalesce into one good officer. The bailiffs of the same year are but one officer according to *R.* v. *Smart* (*a*), and the other cases before-mentioned. The junior bailiff, who is not an alderman, had no right to join in the meeting, but only virtute officii; and he is no officer, but only as he is elected in conjunction with the senior bailiff of his own year: he never was joined with the senior bailiff of another year. Therefore, if recourse may be had to the last senior and junior bailiff legally elected, they must be the last who made a complete officer of the same year. The moiety of an officer of one year cannot be united with a similar moiety of another year. The officer so constituted is neither of the one year nor the other. They never had at any one time any corporate place or office. And here *Parker*, who was *senior* bailiff in the year that *Barker* was *junior* bailiff, is still living. [Lord *Ellenborough* C. J. There does not appear to be any unity of election. The charter appoints the senior bailiff to hold substantively till another alderman be elected.]

1803.

The KING against THORNTON.

[301]

Reader contrà. First a majority of the aldermen were present at the defendant's election, whether the whole number be taken to consist of twelve *exclusive* or *inclusive* of the senior bailiff; for this latter, who is an alderman, having been present, constituted, with the six aldermen, a majority of the 12 or 13, whichever the number be. The proper number, however seems, upon the true construction of the charter, to be only 12, in-

[302]

(*a*) 4 *Burr.* 2241.

1803.

The KING *against* THORNTON.

cluding the senior bailiff; for although upon the first appointment two bailiffs might have been nominated by the Crown, who were not aldermen, and 12 persons besides to be the first aldermen (which sufficiently accounts for the wording of the clauses relating to the common council, and the making of by-laws); yet as the charter provides that every successive election of senior bailiffs should be made out of the body of aldermen, and no power is given to elect an alderman but in case of vacancies by death or amotion, there could not be subsequent to the arst election of a senior bailiff more than *eleven* aldermen at any one time. The election is to be made by "the bailiffs and aldermen for the time being, or the major part of *them*"; now "*them*" cannot mean the aldermen alone, the last immediate antecedent; for that would be to exclude the bailiffs, who were evidently meant to be included, nor is the term majority applicable to the *two* bailiffs alone; and if the intention had been that the two bailiffs and the major part of the aldermen should elect, it would have been so expressed: it must, therefore, apply to both descriptions of persons united as one aggregate body of electors. And there is the less reason for considering the bailiffs and the aldermen as two integral parts for this purpose, because one of the bailiffs must always form one of the body of aldermen. This distinguishes the present case materially from *Rex* v.
[303] *Miller* (*a*), where there was no such link: nothing in common between the body of 48, and the other integral part of the elective body: besides which, the 48 were reduced to 19; and therefore by no medium of calculation could they be said to be represented by a majority of their proper numbers. There is no ground for saying that the character of alderman merges while the alderman is serving as senior bailiff; for the doctrine of merger only applies to incompatible offices; but here there is no incompatibility in one of a body sitting as the presiding officer of it when assembled; as where the eldest alderman, presides in the absence, &c. of a mayor or other head officer, which may happen to be the case under stat. 11. *Geo.* 1. he does not thereby lose the character of alderman, nor his right of voting and being counted as one of that body. As to the second objection, of the want of proper presiding officers; which objec-

(*a*) 6 *Term Rep.* 268.

tion

1803.

The KING *against* THORNTON.

tion is founded, first, upon the recurrence back to former bailiffs de jure, after intervening elections of others de facto, who had served the offices; and, secondly, because of the recurrence back to the senior and junior bailiffs of different years who it is said cannot coalesce to form one officer. As to the first branch of the objection, the election of bailiffs de facto, merely could not put an end to the legal appointment of the bailiffs in office at the time; for the charter directs the bailiffs to hold over "*until*" others shall "*in due manner be elected, perfected, and sworn*"; in other words, until legal successors shall have been appointed to them. And whatever inconveniences may ensue, they have been already incurred by the judgments in Quo Warranto vacating the appointments of the intervening bailiffs. Judicial and ministerial acts may, however, be done by officers de facto. There is no case which has decided, that a legal officer improperly displaced by another may [304] not resume his functions. Suppose one of the bailiffs improperly amoved, and another chosen in his stead, and afterwards ousted within the year, the amoved officer would necessarily resume his functions, and act again with his coadjutor. Then as to the second branch of this objection, that the senior and junior bailiffs of different years cannot coalesce: if it be necessary to recur back at all, the question must always be, Who was the last legal senior and who the last legal junior bailiff in existence? In the *Malden* case (*a*) the two bailiffs were named in the charter as exercising *one office*, and no power is there stated to hold over. But here the words of the charter are different: it does not direct that the senior and junior bailiffs shall hold over till the election of other senior and junior bailiffs; nor are the elections to be made by the same body, nor necessarily at the same instant of time; but the senior bailiff is directed to hold over till the due election of another senior bailiff by one body, and the junior bailiff is to hold over till the due election of another junior bailiff by a different body. It is true that when so elected, the two are to act together, and their concurring presence is necessary to form a good elective assembly. But supposing them to form but one officer, yet there is no identity of persons with the office; and the two who were

(*a*) *Rex* v. *Malden*, 4 *Burr.* 2130. and *R.* v. *Smart, ib* 2241. both arising out of the borough of *Malden*.

1803. The KING *against* THORNTON.

last legally appointed in the form respectively prescribed by the charter, at whatever time so appointed, would form that one officer till a legal successor were respectively appointed to each. At all events, if the construction of the charter be doubtful, the usage will prevail in support of the defendant's
[305] election. [Lord *Ellenborough* C. J. There is no necessity for entering into the argument on this part of the case. All the authorities are collected in the case of *Rex* v. *Bellringer* (a) and *Rex* v. *Miller* (b)].

Dampier in reply, observed, that *Rex* v. *Miller* was decisive, that usage cannot prevail against the plain words of a charter; and therefore there was no need now to discuss the point. That if the senior bailiff were to be reckoned as one of the aldermen, then the corporation would only have had power to elect *eleven* aldermen in the first instance, whereas power was expressly given them to elect *twelve*: and it was not reasonable to suppose that the King intended that a different number of aldermen were to be continued from what he had at first appointed. And that the contrary must be inferred from the clause set out in the replication.

Cur. adv. vult.

Lord ELLENBOROUGH C. J. now delivered judgment. (After stating the pleadings as before set forth). At the argument of this demurrer in the last term, two objections were taken on the part of the Crown to the title of the defendant to the office of senior bailiff, as set forth in his first plea. 1st. That there was *not a good corporate assembly of bailiffs and aldermen on* the 17th of *Nov.* 1802, (the day of election under the mandamus when the defendant was elected senior bailiff,) competent in point of number, that is, in respect of the majority required by the charter, to make an election of senior bailiff. 2d. That supposing there were a competent assembly in point of number, yet that there were *not competent presiding*
[306] *officers at such election*: in other words, that the persons who presided as bailiffs were not at that time the due and legal senior and junior bailiffs. The first objection turns on the question, What is the number of aldermen in this corporation under the charter? The counsel for the Crown contend, that the number is *thirteen*, of whom the senior bailiff is one; and

(a) 4 *Term Rep.* 810. (b) 6 *Term Rep.* 268.

that

that the two bailiffs, making one integral part, they must both be present, as bailiffs, both being necessary to constitute a majority of that integral part: and also that there ought to be seven aldermen present, in order to constitute a majority of *twelve* aldermen besides the senior bailiff. And they say, that such must have been the case at the first election of a senior bailiff next after the grant of the charter; because the Crown, having by the charter appointed a senior and a junior bailiff by name, then directs the election of *twelve* burgesses to be *aldermen;* so that at the next charter day after granting the charter, there must have been *twelve* aldermen *besides* the *two* bailiffs, and of course *seven* aldermen would have been necessary at that assembly to represent the body of aldermen. To this it was answered, on the part of the defendant, that the charter having named the senior bailiff before the appointment of any aldermen in this corporation, such senior bailiff, so appointed by name, was not an alderman: and the charter having directed that *twelve* persons only should be elected aldermen, and that in future the senior bailiff should be elected out of the aldermen, that there has of right been only *eleven* aldermen, besides the senior bailiff, ever since the first charter day for the election of bailiffs next after the grant of the charter: in which case six being the majority of eleven, the body of aldermen was duly represented by its majority at the election in question. But further, that if the construction of the charter be that there should be in all *thirteen* aldermen, viz. twelve besides the senior bailiff, in that case the senior bailiff, who was himself an alderman, and six other aldermen, being present at the defendant's election, the majority of all the aldermen, sufficient to constitute a legal assembly, was present. And we are of opinion on this first objection, that there was a good corporate assembly on the 17th of Nov. 1802, *competent in point of number*. The charter provides, that there shall be two bailiffs, a senior and a junior bailiff, and twelve aldermen. But in providing that the senior bailiff shall be elected out of the aldermen, it prevents *the possibility of there ever being twelve aldermen substantively and distinctly acting as such, apart* from any other corporate character, after the first year, because as after the first year the senior bailiff was to be elected out of the aldermen, being twelve in number, there would of course be only eleven aldermen, left to perform the proper functions

1803.

The KING *against* THORNTON.

[307]

1803.

The KING *against* THORNTON.

tions of aldermen, which is by the charter declared to be that of "*common council of the town assisting and aiding* TO THE BAILIFFS of the same town for the time being, *in all things, causes, and matters whatsoever, in any wise touching or concerning the said town;*" an office which of course cannot be filled by a bailiff who *cannot be council and assistant to himself.* If eleven aldermen are, for the purpose of all elections at which the senior bailiff must be present in another distinct, and, for the time, incompatible character, the *whole body of the aldermen*, (and which they appear to us to be), in that case the six aldermen who were present at the defendant's election did form a competent majority of that integral part of the electing body, consisting only of such eleven members. And upon that suppo-[308]sition, if *the bailiffs were also competent officers, duly invested with that character*, then, inasmuch as both of them were present, there would have been the *whole of that integral part*, (and which the charter is stated in the replication as requiring for the purpose of making of by-laws; on which occasion the bailiffs and aldermen act together as a common council for that purpose;) and a majority of the other integral part of the elective body present at the election. So that in this way of considering it, if the body of aldermen consist for this purpose only of eleven persons, there was a majority of the elective body present, whether they are to be taken collectively, or separately, in their distinct integral characters.

This brings me to the next question, viz. Were there competent presiding officers at this election? The bailiffs do not form together *one* officer, but are *two* officers, having as presiding officers the same function, but capable of being elected on events of death, amotion, and resignation, *at different periods;* of holding their offices of course for longer or shorter times, and necessarily determinable at different times, according as a successor to either might, or might not be, sooner or later "*in due manner elected, perfected and sworn.*" Their offices do not under the charter determine upon the election and swearing in of another officer of the same denomination *de facto*, but such successor must be by the terms of the charter *in due manner*, that is, *legally* elected, perfected, and sworn, in order to determine their own legal holding of the office in question. It is then reduced to the question, Was there any successor of this description ever put in the place of either of the two bailiffs who presided at this election? All the successors of *Thomas Barker*,

1803.

The KING *against* THORNTON.

Barker, the duly elected junior bailiff of 1796, were ousted by Quo Warranto. *Thomas Barker* must therefore still continue junior bailiff up to and at the time of the election in question; no junior bailiff having ever been *in due manner* elected, perfected and sworn in his room. In like manner *David Wheelwright*, the senior bailiff, duly elected in 1797, continued such up to and at the time of the election in question; all his ill-elected successors *de facto* having been in like manner ousted by Quo Warranto. And if each of these bailiffs were separately good officers, they must be jointly so, unless the charter requires each of them to begin, and to cease to exist, at the same precise periods of time respectively, which it does not: and I know of no rule of law which requires any such thing. And if these bailiffs are the proper presiding officers, if the election had been on the charter day, they are also the proper presiding officers at an election made by mandamus under the statute. The consequence is, that the first plea of the defendant is good, notwithstanding these objections; which makes it unnecessary to say any thing as to the sufficiency of the last plea, in which the *usage* since the charter is relied upon. There must therefore be

Judgment for the Defendant.

---

*HAYWARD *against* RIBBANS.

Monday, Nov. 11th.

When a verdict is taken by consent subject to the award of an arbitrator as to the quantum, judgment cannot be signed for the amount of the sum awarded, without first obtaining the usual rule for signing judgment; and where judgment was so signed against the principal without such rule, and the plaintiff proceeded to execution against the bail, after procuring a return of non est inventus to a ca. sa. against the principal, and a return of two nihils to two writs of scire facias against the bail: the Court upon application of the bail together with the principal, held that they were entitled to be relieved from such judgment against the principal and its consequences, against the bail; upon an affidavit by them, that they had no notice of such judgment till the writ of ca. sa. issued against the bail, when they applied to vacate the proceedings. But the Court held that they could not set aside the writ of ca. sa against the bail, on account of such irregularity of the judgment against the principal, while such judgment remained in force.

UPON a rule to shew cause why the writ of *capias ad satisfaciendum* issued against the defendant's *bail* should not be set aside for irregularity, with costs, and the money

1803.

HAYWARD *against* RIBBANS.

levied be restored; it appeared that at the trial of the cause on the 20th of *April* last, a verdict was taken for the plaintiff by consent for 500*l*. subject to the award of *A. B.* under a rule of Court; who afterwards awarded the defendant to pay 376*l*. 7*s*. 9*d*. and the costs of the cause and the reference.. The verdict was accordingly entered up for the sum specified; and after notice to attend the taxation of costs before the master, which the defendant omitted to do, the costs of the cause and of the reference were taxed on the 4th of *June*, and the judgment was signed the same day, *without the plaintiff's having first obtained a rule to sign judgment.* The plaintiff afterwards issued a capias ad satisfaciendum against the principal, which he procured to be returned non est inventus on the 14th of *June*; and after issuing two scire facias, the last returnable the 28th, against the bail, which were both returned nihil, the present writ of capias ad satisfaciendum, now sought to be set aside, was sued out. And it further appeared from the affidavits of the principal, and the bail, and their attorney, that till such writ of execution issued they had no notice in fact of the signing the judgment against the principal, nor of the proceed-
[311] ing against the bail; otherwise the principal, who was forthcoming all the time at his usual place of residence, would have been rendered in due time in discharge of his bail; and that notice having been given to the plaintiff's attorney before the judgment signed against the principal, that he had become a bankrupt, and a commission ordered to be issued, he said that he must then look to the bail; on which the defendant's attorney answered, that if he proceeded against the bail they would render the principal.

Erskine, *Garrow*, and *Comyn* shewed cause, and contended, first, that as the plaintiff was entitled to enter up judgment for the amount of the sum awarded, without first applying for the leave of the Court so to do, according to *Lee* v. *Linguard* (*a*) so it was not necessary first to obtain a rule to sign judgment.

The Court, however, upon reference to the master, was clearly of opinion, that a rule to sign judgment was necessary before judgment entered.

(*a*) 1 *East*, 401.

2dly,

1803.

HAYWARD *against* RIBBANS.

2dly, They objected, that the bail could not take advantage in this collateral and summary way, of any irregularity in the judgment against the principal, while that judgment remained in force; and cited *Chomley* v. *Veal* (a), and *Campbell* v. *Cumming* (b). [*Lawrence*, J. observed, that those were cases where the objection to the judgment was attempted to be shewn *by pleading* in a collateral action; to which the general rule applied, that an erroneous judgment could only be corrected by writ of error.] 3dly, That at any rate this being mere matter of irregularity, it was now too late to take advantage of it; the principal having had all *Trinity* term from the 14th to the 29th of *June* to apply to set the judgment aside on that account. [312] 4thly, They contended that there was no necessity for notice in fact to the bail of the plaintiff's intention to proceed against them; the return of two nihils upon the writs of scire facias against the bail, after non est inventus returned to the ca. sa. against the principal, being always deemed sufficient to fix the bail (c). [This last ground was not disputed by the counsel on the other side, and was assented to by the Court.]

Gibbs and *Marryat* in support of the rule, on the remaining objections, the second and third, contended, first, that it was competent to the bail, *with whom the principal joined in the application*, to take advantage of the irregularity in signing judgment against the principal, without having first obtained a rule to sign judgment; because the plaintiff had thereby obtained an undue advantage against the bail themselves: for not only were the parties surprised for want of such due notice as the practice of the Court required to be given, but the proceedings themselves were thereby accelerated against the bail: for the rule for judgment being a four day rule, if that had been given, the second scire facias would not have been returnable till the second return of this term, instead of in *Trinity* term, and the bail would have had so much the more notice to render the principal. And, secondly, that there can be no waver of an irregularity before it is known; and here none of the parties had notice of the proceedings till the execution issued against the bail.

(a) 6 *Mod.* 304. (b) 2 *Burr.* 1187.
(c) Vide *Clarke* v. *Bradshaw.* 1 *East*, 89, where the reason of this practice is assigned.

The

1803

HAYWARD *against* RIBBANS.

The Court said, that while the judgment stood against the principal, the capias ad satisfaciendum and all other proceedings founded upon such judgment must also be taken to be regular. That the present rule, therefore, was conceived in wrong terms; for if there were any objection founded on the irregularity of that judgment, the rule should have been drawn up to set aside the judgment for irregularity, and the subsequent proceedings on it. And therefore in strictness the plaintiff was entitled to have this rule discharged with costs. But the Court were of opinion, that the parties had not waved the irregularity, not having had notice, as far as appeared, of the signing the judgment; and that they were entitled to a rule for setting the judgment aside for irregularity and all the subsequent proceedings. They therefore proposed to save future expence to both parties, that this rule should be discharged *without* costs, and that the judgment against the principal and subsequent proceedings against the bail should by consent be set aside.

The matter accordingly stood over to give time to counsel to obtain such consent: and finally, what the Court proposed was adopted.

Tuesday, Nov. 15th.

DOE, on the Demise of ANN GILMAN, Widow, *against* ELVEY.

Under a devise to *A*, and to the issue of his body *his, her, or their heirs, equally to be divided if* more than one; and if *A* have no issue of his body living at his decease, then over: held that *A* took at least an estate for life, with a contingent remainder in fee to his issue, if any; in which case the remainder over was also contingent, being a contingency with a double aspect; and that whether *A.* took for life, with such contingent remainders, or whether he took an estate tail, the remainders over were equally destroyed by his having suffered a recovery before he had any issue born.

THIS ejectment, brought to recover the possession of a messuage, &c. and premises at *Dover*, in the county of *Kent*, was tried at the last assizes for that county, *when a verdict was found for the plaintiff, subject to the opinion of this Court on the following case:

John Gilman, being seised in fee of the premises in question, by his will dated the 28th of *March* 1772, duly executed and attested, devised the same as follows; "I give and devise unto

1803.

DOE d. GILMAN *against* ELVEY.

"my wife *Mary Gilman*, all that my messuage or tenement, "with the outhouses, &c. in *Dover*, now in my own occupation, "and all other my real estate to hold to my said wife and her "assigns for her natural life, she keeping the same in repair; "and from and after her decease I give and devise all the same "*to my son Henry Gilman, and to the issue of his body law-*"*fully begotten, or to be begotten, his, her, or their heirs,* "*equally to be divided if more than one:* and *if my said son* "*Henry Gilman shall have no issue of his body lawfully be-*"*gotten, living at the time of his decease, then* I give and de-"vise the said messuage, &c. and all other my real estate *unto* "*my grandson Hayes Elvey and to his heirs and assigns for* "*ever.*" *John Gilman* died in *Nov.* 1775, leaving his wife *Mary* and *Henry Gilman* his son and heir at law him surviving. *Mary Gilman* died some time afterwards; and upon her death *Henry Gilman* entered into possession of the premises; and being seised thereof, in *Easter* term 1788, duly suffered a common recovery of them, the uses whereof were, by indenture dated the 3d of *April* 1788, (being the release to make a tenant to the præcipe,) declared to be to the said *Henry Gilman* in fee. *Henry Gilman* afterwards by his will dated the 23d of June 1788, duly executed and attested, devised the premises to his wife *Ann Gilman*, the lessor of the plaintiff in fee; and died in *Nov.* 1796, without leaving any child living at the time of the death of the said *John Gilman*, or at any time afterwards. The defendant is the heir at law of *Hayes Elvey*, named in the will of the said *John Gilman*. The question for the opinion of the Court was, Whether the plaintiff were entitled to recover, &c.? [315]

Harvey for the plaintiff. The question turns upon the devise to the testator's "son, *H. Gilman*, and to the issue of his "body, and his, her, or their heirs, equally to be divided if "more than one: and if his son should have no issue of his "body living at his decease," then over. It is a settled rule that no limitation in a will can be construed as an executory devise, if by law it may take effect as a remainder. *Purefoy* v. *Rogers* (*a*), *Wealthy* d. *Mauley* v. *Bosville* (*b*), and *Doe* v. *Morgan* (*c*). Now here either *H. Gilman* the son took an estate tail under the will, which was barred by the recovery

(*a*) 2 *Saund.* 388. (*b*) *Rep. temp. Hardw.* 259. (*c*) 3 *Term Rep.* 765.

suffered;

1803.

Doe d. Gilman *against* Elvey.

suffered; or if he took only an estate for life, then the limitation to the issue of his body was *a remainder*, and, as he had no issue, *a contingent remainder;* and consequently the next limitation to *Hayes Elvey*, was also a contingent remainder; not indeed one which was to take effect after the other, but they were concurrent contingent remainders, of which one only could take effect. But first, *H. Gilman*, the son, took an estate tail; for though there are superadded words of limitation to the devise to "the *issue* of his body, *his, her, or their heirs*, equally "to be divided if more than one;" yet where the superadded words of limitation do not make *the issue* to take in a different way from what the ancestor would have done if he took an estate tail, such words of superaddition are to be rejected as surplusage; and the ancestor to whom and to whose issue the
[316] estate is limited, takes an estate tail. (He referred to the rule as recognised in 1 *Fearne's Cont. Rem.* 141, 3d edition, drawn from all the cases collected there and in some antecedent pages; to which he added *Denn* d. *Webb* v. *Puckey* (*a*).) No express intention appears in the testator that his son should only take for life; as by adding the words *for life* to the limitation to him. But the words "*equally to be divided* if more than one," superadded to the limitation to the *issue* of the son and *his, her, or their heirs*, will be relied on as varying the estate which such issue would otherwise take if the ancestor took an estate tail, and shewing an intention to lodge the estate of inheritance in such issue as purchasers; and consequently to confine by implication the estate of the ancestor to a life estate. But if such be their effect, then, secondly, the limitation to the issue of *H. Gilman* was a contingent remainder in fee, being made to persons not in esse at the time, and who never were in esse before the recovery suffered, by which the particular estate on which such contingent remainder depended was destroyed; and the contingent estate subsequently limited thereby became barred; according to the doctrine of *Loddington* v. *Kime*, (*b*). This was a contingency with a double aspect: if *H. Gilman* had issue at his death, such issue were to take the remainder in fee; if he had no issue, then *Hayes Elvey* was to take it. And he referred to *Doe* d. *Davy* v. *Burnsall* (*c*), *Denn* d. *Webb* v. *Puckey* (*a*), and *Doe* d. *Brown* v. *Holme* (*d*), as in point.

(*a*) 5 *Term Rep.* 299.
(*b*) *Salk.* 224. and 1 *Ld. Ray.* 203.
(*c*) 6 *Term Rep.* 30.
(*d*) 3 *Wils.* 237 and 241.

Pitcairn,

1803.

DOE d. GILMAN *against* ELVEY.

Pitcairn, for the defendant, admitted that if the remainder over to *Hayes Elvey* were an executory devise, the case would fall within the doctrine of *Loddington* v. *Kime*; *but contended that *H. Gilman* took for life, with remainder to his issue *in tail* only, and not in fee, and consequently the remainder over was not contingent, but vested, and could not be destroyed by the recovery suffered. The devisor's intent was, that the issue of *H. Gilman* should take distributively, and therefore they must take as purchasers and not by descent: and as there is nothing to limit the estate to heirs *male*, it equally breaks the descent in gavelkind. In *Hockley* v. *Mawbey* (*a*), where the devise was to the testator's son and his issue, *to be divided as he should think fit*; and *if* he should die *without issue*, remainder over, Lord Chancellor held that the son took only for life, with a power to divide amongst his children, if any; in which event they would take distributively as purchasers; or if he made no such division they would take equally: but that there being no children, the remainder over vested. So in *Doe* v. *Burnsall* (*b*), where the limitation was to *M. O.* and the *issue* of her body *as tenants in common*, if more than one; it was holden that *M. O.* took only for life, because the issue taking *as tenants in common*, could only take as purchasers. Then the remainder to *H. Gilman's* issue was only a remainder in tail and not in fee; for the word *heirs* ("his, her, or their *heirs*") must be construed *heirs of the body*, and not *heirs* generally; according to *Webb* v. *Hearing* (*c*), *Nottingham* v. *Jennings* (*d*), and *Parker* v. *Thacker* (*e*); the limitation over being to the grandson *Hayes Elvey*, who would be the collateral *heir* of such issue: and if the remainder to the issue of *H. G.* were only in tail, then, according to the fifth resolution in *Loddington* v. *Kime* (*f*), the remainder over was vested and not contingent. [*Le Blanc* J. observed, that the devise over to *Hayes Elvey* was not in default of *heirs* of *H. Gilman*, but of *issue* living at his death.]

*[317]

[318]

Lord ELLENBOROUGH C. J. This case falls, I might almost say in terms, within the decision of *Doe* v. *Burnsall*; for that

(*a*) 3 *Bro. Ch. Cas.* 82.
(*b*) 6 *Term Rep.* 307.
(*c*) *Cro. Jac.* 415.
(*d*) 1 *P. Wms.* 23.
(*e*) 3 *Lev.* 70.
(*f*) *Salk.* 224.

1808.

Doe d. Gilman *against* Elvey.

was a devise to one and the issue of her body *as tenants in common* if more than one, and in default of such issue, &c. then over: and this is a devise to one "and the issue of his body, "and his, her, or their heirs, *equally to be divided* if more than one," and if the first taker have no issue, then over. It is in effect therefore a devise to the issue of the first taker *as tenants in common:* and the first taker having no issue born at the time has suffered a recovery. Then quâcunque viâ datâ, if *H. Gilman* took an estate tail, it was barred by the recovery suffered; if he took an estate for life only, the next limitation to the issue unborn was contingent; and the remainder over being also contingent, according to *Loddington* v. *Kime*, those contingent estates were destroyed by the recovery suffered before the event took place. *Doe* v. *Holme* is a case of the same description.

Grose J. declared himself of the same opinion.

Lawrence J. The cases relied on by the defendant's counsel, as distinguishing this from those mentioned by my Lord, were cases in which the limitation over was in default of *heirs* of the last taker to one who was his *collateral heir;* which shewed that by the word *heirs* was meant *heirs of the body;* but here the limitation over is in default of the persons themselves to whom the inheritance was limited, and not of their heirs.

[319] Le Blanc J. The word *heirs* may be interpreted to mean *heirs of the body*, where that appears to have been the intent of the devisor by limiting the estate over, in default of *heirs* of such an one, to a person who would be his heir if he had no issue: but here the devise is first to *H. Gilman* and to *the issue* of his body, *his*, *her*, or *their heirs*, *equally to be divided* if more than one; and the limitation over is not in default of *heirs* but of *issue* of the body of *H. Gilman*, &c. Therefore it is a devise for life to *H. Gilman*, with remainder in fee to his issue, if he had any; and if their estate should not take effect, then over in fee to *Hayes Elvey*. That brings it within the case of *Loddington* v. *Kime;* it is a contingency in fee with a double aspect; and a recovery having been suffered by the tenant of the particular estate before the first contingency happened has destroyed all the contingent estates.

Postea to the Plaintiff.

1803.

BUSK *against* FEARON and Others.

Tuesday, Nov. 15th.

In a respondentia bond, the condition, after reciting that the money was lent *upon the goods laden and to be laden* on board a certain ship on her voyage out and home, was, that if the ship should proceed on her voyage and return within 36 months (the dangers of the seas excepted) and if the borrower, within 30 days after her arrival, should pay to the lender the sum agreed on, or if in the voyage and within the said 36 months the ship should be lost by fire, enemies, or other casualties, the borrower should, within six months after such loss, pay to the lender a proportionable average on all the goods carried out and acquired during the voyage which should be saved, then the obligation to be void: held that this was no more than a personal obligation from the borrower to the lender, and did not give the latter any specific *pledge or lien* on the home cargo or the proceeds thereof.

THE plaintiff sued on behalf of himself and other creditors of *J. P. Fearon*, who had lent money upon respondentia on goods laden on board the ship *Belvedere*, against the defendant *J. P. Fearon*, a bankrupt, and his assignees, and the *East-India* Company, and *Ann Douglas*, widow. Whereupon the following case was sent by the Lord Chancellor for the opinion of this Court.

J. P. Fearon, commander of the *East-India* Company's ship *Belvedere*, and *P. Douglas* now deceased, gave *Busk* a respondentia bond, dated 4th *May* 1801, by which they jointly and severally bound themselves in the penal sum of 1500*l.* with a condition, reciting, that whereas *Busk* had advanced to *Fearon* and *Douglas* 750*l.* "upon the goods, merchandizes, and effects laden and to be laden on board the ship *Belvedere*, then at anchor in the *Thames*, outward bound to *China*, whereof *Fearon* was commander; the condition of the obligation was, that if the said ship should proceed from the river *Thames* on a voyage to any port in the *East-Indies*, *China*, &c. and from thence return to the river *Thames* at or before the end of thirty-six calendar months from the date, and there end her said intended voyage, (the dangers and casualties of the seas excepted,) and if *Fearon* and *Douglas*, or either of them, &c. should within thirty days next after her arrival, &c. pay to *Busk* 1020*l.*, together with 13*l.* 10*s.* per calendar month for every calendar month, and so proportionably, &c. as shall be elapsed out of the said 36 calendar months, over and above twenty calendar months to be accounted from the date; or if in the said voyage and within the said thirty-six calendar months the ship should be utterly lost by fire, enemies, men of war, or any other casualties, and *Fearon* and *Douglas*, their heirs, &c. should within six calendar months next after such loss well and truly account for (upon oath if required) and pay to *Busk*, his executors, &c. a just and proportionable

1803.

Busk *against* Fearon.

average on all the good and effects of *Fearon* carried from *England* on board the said ship, and the net proceeds thereof, and on all other good and effects which *Fearon* should acquire during the said voyage for or by reason of such goods, merchandizes, and effects, and which should not be unavoidably lost, then the obligation to be void." *Busk* the obligee paid *Fearon*
[321] 750*l.* the consideration money. *Fearon* loaded on board the ship *Belvedere* goods of the value of 10,000*l.*; and the ship sailed from the river *Thames* on her said voyage, and arrived with her cargo at *China*, where *Fearon* disposed of those goods, and with the produce thereof purchased other goods, which he loaded on board the ship at *China;* and the ship afterwards arrived safe with her homeward-bound cargo on board in the river *Thames* on the 29th of *September* 1802. The goods so brought from *China* were deposited in the warehouses of the *East-India* Company, according to the by-laws and regulations of the Company; and part of them have been sold for 7000*l.* and the money received by the Company; and 3000*l.*, part of that sum, hath since the commencement of this suit been paid over to the assignees of *Fearon;* and 4000*l.* the residue yet remains in the hands of the Company for the use of the person entitled to the same. Other part of the goods yet remain in the possession of the Company. *Douglas* is dead intestate, and *Ann Douglas* is his administratrix. On the 12th of *February* 1803 a commission of bankrupt issued against *Fearon*, under which he was declared a bankrupt; and the other defendants in the suit are his assignees. The question for the opinion of the Court was, Whether *Busk* has by law in respect of the money remaining due to him by virtue of the bond above stated any *lien upon* or *interest in* the said money and goods so remaining in the possession of the *East-India* Company, or either and which of them? And whether the same, or either and which of them, are or is by law liable to satisfy what so remains due to *Busk*?

Bayley Serjt., for the plaintiff, contended that he had such
[322] an interest in the homeward-bound cargo as entitled him to claim it, or the produce thereof in the hands of the *East-India* Company to the extent of the obligation in question; 1st, upon the special agreement between him and *Fearon;* 2dly, by the general law applicable to respondentia creditors. 1st, The condition of the bond states that the money was advanced by

Busk

1803.

BUSK *against* FEARON.

Busk "*upon the goods and effects laden and to be laden on board the ship.*" It was not therefore advanced upon the defendant's *personal* credit, with a clause for re-payment if the goods *laden or to be laden*, &c. should reach their ultimate place of destination, but specifically upon the credit of the *goods* themselves. It was competent to *Fearon* to pledge or mortgage not only the outward-bound cargo, but also all other goods which during the voyage should be laden on board the ship: then having done so, the lender acquires a specific property in the goods themselves by the agreement of the borrower; in like manner as the mortgage of land has the specific security of the land: and as the remedy of the latter is by ejectment if his loan or interest be not repaid, so the remedy of the lender upon goods, in default of payment, is trover. The very application to this mode of borrowing, so injurious to the borrower, shews that he has no *personal* credit; for the interest of a loan obtained in the ordinary way, even with the addition of insurance to secure the capital, is always less than respondentia interest. 2dly, This claim upon the goods arises out of the very nature of the respondentia security as part of the general marine law. There seems to be three descriptions of the usura marina described in the books (*a*), 1st, where the lender advances money on the security of the ship, (called bottomry), that is to be repaid with certain interest in case the ship perform her voyage safely; [323] in which case the ship itself is pledged to the lender as a security: 2dly, Where money is advanced to be repaid in case the cargo arrives safe at the place of destination (called respondentia); in which case, by a parity of reasoning, the cargo is pledged to the lender; though Mr. Justice *Blackstone* seems to consider, that in this case the person of the borrower only is liable, and not the goods, which he observes must necessarily be sold or exchanged in the course of the voyage: for this however he cites no authority; and the reason does not apply where the homeward as well as the outward-bound cargo is pledged; as in this case, where the money was lent on goods "laden and *to be* laden on board," &c. 3dly, Where money is advanced to be paid on the event of a certain voyage terminating favourably, but where the money is not advanced on the

(*a*) 2 *Blac. Com.* 457, 8. *Molloy de Jure Mar. b.* 2. *c.* 11. *s.* 12—15. *Maleyn's Lex. Merc. b.* 1. *c.* 31. *Beawes' Lex. Merc.* 127. *Park on Insur. ch.* 21. tit. *Bottomry and Respondentia.* And *Marshall on Insur.* 633.

security

1803. — BUSK *against* FEARON.

security either of the ship or goods, and where it is immaterial whether the borrower have or have not any interest in either. The second point does not seem to have received any judicial determination in this country. In point of reason and equity the lender on the credit of the goods ought to have the same security on them as the lender on bottomry has upon the ship; the risk is the same, and the terms of the obligation are alike. And *Poitier* (*a*) expressly says, that by the law of *France* the lender of money on goods has the goods pledged to him for the repayment. [Lord *Ellenborough* C. J. asked whether that author gave the form of the respondentia bond given in *France*, in the same manner as the forms of such bonds given at *Cadiz* and in *London* are set forth in *Wesketh* (*b*); for possibly there might be a specific pledge of the goods.] That does not ap-
[324] pear; but the borrower is also liable personally. *Bynkershoek* (*Quest. Jur. Priv.* p. 506, 7, 9, 13. *lib.* 3, *ch.* 16.) thinks that it makes no difference whether the form of the bond give to the lender the pledge of the goods in terms or not; because he considers that the nature of the contract gives him that security. *Beawes' Lex Merc.* 127. says, that "*usura marina* joins the advanced money and the danger of the sea together: and this is obligatory sometimes to the borrower's ship, *goods*, and person." In *Glover* v. *Black* (*c*) where the question was whether an insurance on goods would cover a *respondentia* interest, Lord *Mansfield* said, "lenders at *respondentia*, or on bottomree, may to many purposes be said to have a lien." He therefore considers them as classed together. [Lord *Ellenborough* C. J. At the most there can only be a contingent equitable lien; and that in the case specified in the condition of the bond of a salvage upon a loss: and that is rather an equitable lien on the fund, than a specific lien upon the property.] By the general law the lender at respondentia has the pledge of the goods in the nature of a mortgage; and it seems reasonable that it should be so upon considering the nature of the contract as recognized by the stat. 19 *Geo.* 2. *c.* 37. *s.* 5. whereby "every sum of money "lent on bottomree or at respondentia upon any (*British*) ship "bound to or from the *East Indies* shall be lent *only* on the "*ship*, or *on the merchandize or effects laden or to be laden* on "board of such ship, and shall be so expressed in the condition of the bond." But the clause goes on to provide that

(*a*) Vide 3 vol. p. 212. 257. s. 52. 260. s. 56.
(*b*) P. 58. 60. (*c*) 3 *Burr.* 1394. 1400.

the

the borrower shall be personally responsible to the lender for so much of the money borrowed as he has not laid out on the ship or merchandize, notwithstanding the ship and merchandize shall be totally lost. The homeward cargo *being the produce of the money lent, it is reasonable that the lender should have the pledge of it; and there is no hardship on the other creditors of the borrower, because if the specific money had not been lent the goods could not have been provided, and consequently there could have been no fund out of which the general creditors could be paid.

1803. BUSK *against* FEARON.

*[325]

Gibbs, contrà, was stopped by the Court.

Lord ELLENBOROUGH C. J. This appears to be a contract, not of universal nature and form, but depending upon the particular form of the instrument, varying in different countries. In *Spain* it seems more like a direct hypothecation of the goods; which would make all the difference in the construction. But nothing of that sort is to be found in this instrument. In the introductory part indeed of the condition the money is stated to be lent *on the goods;* but that is explained in the subsequent part, and shewn to be only a pledge for the purpose of salvage. And no action could be maintained by the obligee to recover possession of these goods from the borrower or any other having also a claim upon them; for admitting that the borrower and lender were even partners in them, the latter could not maintain trover against the other. We must construe the contract upon the words of this bond, such as these parties have made use of; for it is this contract, and not one of a general nature to be governed by general usage that they have entered into. If indeed there were any word used of doubtful signification, it might be construed by general usage. But here the terms of the bond are very plain and intelligible, and amount only to a personal obligation on the borrowers. We shall certify our opinion.

LAWRENCE J. If the lender were enabled to take possession of the goods from the borrower, the very object of the contract would be defeated; for how then would the latter be enabled to carry on the adventure or sell the goods which he brought home, out of which the loan is to be repaid. [326]

1803.

BUSK *against* FEARON.

Afterwards the following certificate was sent to the Lord Chancellor:

We have heard this case argued by counsel; we have considered it; and are of opinion that under the circumstances of this case the said *Hans Busk* hath not by law, in respect of the money remaining due to him by virtue of the bond above stated, any lien upon or interest in the said money or goods so remaining in the hands and possession of the *East-India* Company: and that neither the said money nor goods are by law liable to satisfy what so remains due to the said *Hans Busk*.

Nov. 28th, 1803.

ELLENBOROUGH.
N. GROSE.
S. LAWRENCE.
S. LE BLANC.

Tuesday, Nov. 15th.

*The KING *against* OSBOURNE.

The surrender of a charter is void for want of enrolment. Where a charter granted to the mayor and commonalty that "any alderman being wanted, the rest of the *aldermen might nominate* two *burgesses*, for the choosing of one of them as alderman by the *commonalty* (per communitatem) held that *commonalty* included the whole corporation, and that an alderman so elected by the votes of the other aldermen, as well as the burgesses at large, was properly elected. It seems that cotemporaneous and continuing usage may be resorted to in aid of the construction of doubtful words in an old charter. Where an information in nature of quo warranto was moved for on the ground of a disputed mode of election, which alone was in controversy at the time of the defendant's election, and which ground was afterwards answered on shewing cause, the Court would not in their discretion make the rule absolute to try another incidental and secondary question, as to whether there were a sufficient interval of time allowed between the nomination and election of the defendant, no person's right having been set aside by means of such acceleration of the election, if it were accelerated.

A Rule called on the defendant to shew cause why an information in nature of Quo Warranto should not be exhibited against him to shew by what authority he claimed to be one of the aldermen of the borough of *Kingston-upon-Hull*. This was founded on affidavits stating that this was an ancient borough, incorporated under divers charters prior to that of the 4 *Jac. 2.*; by which latter, reciting the *surrender* by the corporation of all prior charters, liberties, and franchises, into the King's hands, and which he had accepted, King *James* II. incorporated the burgesses by the name of the Mayor and Burgesses of the borough, &c.; and granted that there should be one

*[327]

1803.

The KING *against* OSBOURNE.

one mayor, and one sheriff, one recorder, &c., and thirteen honest and discreet men *inhabiting and residing within the same town or borough*, to be called *aldermen*, which aldermen are thereby also declared to be the common council of the borough and justices of the peace. It then stated the mode of electing the mayor by the same charter to be, that on every *Monday* next before the feast of *St. Michael*, &c. the mayor, aldermen, and burgesses, should assemble at the *Guildhall*, and that the mayor and aldermen, or the major part of them for the time being, so assembled, should nominate two of the aldermen, and that the mayor and the rest of the aldermen, and also the burgesses, or the major part of them so assembled, should elect one of the said two aldermen so nominated to be mayor, who should serve the office for the year ensuing, and until another was in due manner elected and sworn. It then stated the mode of electing *aldermen*, that if any or either of the aldermen should die, or be removed, or *depart* from the said office, the mayor and the rest of the aldermen and *burgesses* then remaining or surviving, *or the major part of them*, (of whom the mayor to be one,) should *elect*, nominate, and prefer *one or more other of the burgesses* for the time being, in the place or places of the same alderman or aldermen so happening to die, be removed, or depart, to supply the aforesaid number of thirteen aldermen. Which said letters patent, the relators stated, were, as they understood and believed, *accepted* by the said mayor and burgesses, and are now in full force and effect. The affidavits then stated a vacancy by the death of one of the aldermen, and a notice, signed on the 3d of *May* 1803 by several of the burgesses, and delivered to the mayor, requiring him to appoint a day and hour, by sufficient public notice, for the election of an alderman, when and where *the burgesses at large* might proceed to the election of another *burgess from amongst themselves* to be alderman, &c. That no answer was returned to this, but the mayor and aldermen afterwards met about 12 o'clock on the same 3d of *May*, and about one o'clock the same day proceeded from the council chamber in the *Guildhall* to another room there where the Sessions are usually holden, when proclamation being made for the burgesses to attend, the mayor informed the burgesses present that the aldermen had nominated Mr. *Osbourne* (the defendant) and Mr. *J. Harrices*, one of whom they must choose: upon which one of the burgesses informed the mayor that it was very unusual to proceed to an election [328]

1803.

The King *against* Osbourne.

election immediately upon the nomination of two persons; and on behalf of himself and *the burgesses at large protested against the proceedings. The mayor in reply said, that in one instance (that of Mr. *Coulson*, who was elected alderman about two years ago) they had proceeded in the same manner, though [*329] no other occurred in his recollection: but he said he would proceed to the election, and would not take a poll for any other person than one of the two so nominated by the aldermen. Whereupon the same burgess proposed *B. B. Haworth*, Esq., a burgess, to be elected an alderman, which nomination was seconded by others of the burgesses who came accidentally into the hall on hearing the election was likely to come on. But the mayor refusing to take votes for Mr. *Haworth*, the same burgess took the poll for him, which amounted to 286 votes, and the town-clerk took the votes for the defendant and Mr. *Harrices*, viz. for the defendant 57, for Mr. *H.* 3, on which the mayor declared the defendant elected, and he was sworn in the 17th of *May* last. But that the defendant did not for long before, nor at the time of his election, inhabit, nor has he since had any residence within the borough, but lives 5 or 6 miles distant from it. The relators' affidavits further stated their information and belief, that though many of the aldermen had been elected from two of the burgesses previously nominated by the mayor and aldermen, yet that such nomination was not warranted by charter; and particularly as it appears that aldermen were first constituted by a charter of the 18 *H.* 6. by which charter the King granted *to the burgesses* that *they and their heirs and successors* might choose *from amongst themselves* 13 aldermen, one of them should be mayor, and that on the death or amoval of any alderman *the rest of the burgesses*, their heirs and successors, might choose one other burgess from among [330] themselves to be alderman in the room of him so dying or amoved. The affidavits then set forth part of a charter of the 13th of *Car.* 2. granting that there should be within the borough thirteen aldermen *inhabiting and dwelling within the same borough;* and that in case of the death or amoval of any of them, it should be lawful for the mayor, aldermen, and burgesses of the borough for the time being *in a convenient time* to assemble and to elect one or more of the burgesses in the room of the same alderman, &c. so dead or amoved. And then it was stated, that except in the case of Alderman *Coulson*, and in this instance, at least a week or ten days, and sometimes near

1803.

The KING *against* OSBOURNE.

three weeks, were always suffered to elapse between the nomination by the mayor and aldermen and the election: whereas here the election had followed immediately on the nomination, without any other notice than the tolling of a certain church bell; and that many of the resident burgesses were unacquainted with the purport of the meeting till the election was over: and that no answer had been returned by the mayor to a requisition made by the relators, burgesses, to inspect the corporation charters and books, &c.

In answer to the above the defendant's affidavits set forth another charter to this corporation of the 21 *H.* 6., whereby the King granted to " the mayor and *commonalty* of the said town, and their successors, that they might when necessary elect the mayor, sheriff, and chamberlains of the said town in manner following, viz. that all and singular the aldermen appearing and present at the place and time of such election, or the major part of them then appearing and present, might nominate two aldermen of the said town for the choosing one of them mayor by the commonalty, of the said town, and two burgesses of the said town for the choosing one of them as sheriff by the said commonalty, and four burgesses of the said town for the [331] choosing two of them chamberlains by the commonalty: and any alderman of the said town being wanted, *the rest of the aldermen of the said town* might nominate two burgesses of that town, for the choosing one of them as alderman of the said town by the *commonalty* of the said town: and that such election should from henceforth be made in manner and form preceding, and not otherwise," &c. They then stated, that by divers entries in the corporation books and records it appeared, that upon the vacancy of an alderman it has been the custom for the mayor and aldermen, or the major part of them, to nominate two burgesses, for the mayor, aldermen, and burgesses to elect one of them to be an alderman, which nominees have been called *lites* (*a*), and a succession of such instances were produced at different times from the 2d of *Elizabeth* down to the year 1747, with some exceptions and variations during the time of the commonwealth, and in particular instances; in the course of which it appeared that sometimes the election had been proceeded upon on the same day as the nomination of the lites, though in general it seemed to be by appointment on a

(*a*) Semble *elites*, or chosen.

subsequent

1803.

The KING *against* OSBOURNE.

subsequent day: the notification of such corporate meetings being by the tolling of the great church bell or *burgess bell.* The affidavits then proceeded to state the election of the defendant (in which the aldermen as well as burgesses joined) according to this mode to be an alderman, and his swearing in; and to deny any cause of complaint for want of notice, as a greater number of burgesses than usual attended the election, and the purpose of the meeting was generally known. And it
[332] was further stated, that on searching the Rolls Chapel in *Chancery Lane* the depository of corporation charters surrendered in the reigns of *Charles* II. and *James* II., no surrender was to be found of any prior charter granted to this corporation.

Erskine, *Garrow*, and *Wood* shewed cause against the rule, and relied on the election of the defendant having been made in the customary mode prescribed by the charter of 21 *H.* 6., which had always been the governing charter in such elections; and that no stress could be laid on the charter of *James* II., not only on account of the general discountenance of *Westminster-Hall* against charters granted by that Prince under the known fraud and violence of the times, and the reprobation of them by the bill of rights; but because of the want of enrolment of the surrender of the prior charters, which avoided the surrender, according to *Butler* v. *Palmer* (a), and *Piper* v. *Dennis* (b). And they denied any surprize, as the election was notorious in the town, and the adverse candidate had a large majority of votes supposing he was a legal candidate, the only question being the mode of election by which he was chosen.

Gibbs, *Park*, *Wigley*, and *Becket*, in support of the rule, insisted on the popular mode of election as confirmed by the charter of *James* II., but which was also given by a prior charter of the 13 *Car.* 2., against which there was no objection; (though that part of it was not set out in the affidavits). But supposing the charter of the 21 *H.* 8. to be the governing charter in this respect, which they denied, they still contended
[333] that the defendant's election was bad, because the aldermen had joined in it with the burgesses: whereas by that charter

(a) *Salk.* 191. (b) 12 *Mod.* 253. *Holt* 170. S. C.

the election of one of the two nominated by the aldermen was to be made by the *commonalty*; and the word *commonalty* or *communitas* signified the burgesses at large, and was particularly used in that charter in contradistinction to the select body of the mayor and aldermen. And this could not be explained by usage, the meaning of the words being plain, even if usage could be received in explanation, which seemed to be much questioned in *R.* v. *Bellringer* (*a*), where it was pleaded. They also relied upon the want of the ordinary time and notice between the nomination and election. [Lord *Ellenborough* C. J. said, it was in constant practice at nisi prius to receive evidence of usage to explain doubtful words in old instruments: and it would be difficult to shew any just ground of distinction between the information which a judge might receive to aid his judgment in bank and at nisi prius. And *Lawrence* J. observed, that in the case cited the usage was pleaded, not to explain a doubtful word in an old charter, but to give a construction to the general terms of it.]

1803 — The KING *against* OSBOURNE.

The Court said they would look into the affidavits; and the next day,

Lord ELLENBOROUGH C. J. delivered the opinion of the Court.

This rule to shew cause why an information in Quo Warranto should not be exhibited against the defendant was obtained on affidavits insisting, that a charter of the 4th of King *James* 2. granted upon the surrender of their former charters, &c. into the king's hands, was the governing charter of the corporation of the town of *Kingston-upon-Hull*. And the parties applying for the rule swear in terms that they "understand and believe that this charter of 4 *J.* 2. was duly accepted by the mayor and burgesses, and is now in full force "and effect, and ought to guide the several elections of mayor, "aldermen, and other officers of the borough." The other charters therein mentioned of 18 *H.* 6. and *Car.* 2. are introduced into the prosecutor's affidavits only for the purpose of shewing that aldermen were, in cases of vacancies in the body of aldermen, under those charters, elected from the body of [334]

(*a*) 4 *Term Rep.* 821. and vide *R.* v. *Miller.* 6 *Term Rep.* 268. 281.

burgesses

1803

The KING *against* OSBOURNE.

burgesses at large, without any nomination being previously made of the persons, out of whom the choice should be made, by the mayor and aldermen. The substantial question which might naturally have arisen upon the affidavits upon which the rule was obtained was, Whether the charter of *James* were the governing charter? or, Whether there were any other charter or prescriptive constitution under which a previous nomination of two burgesses, out of whom the body at large were to choose one, could be supported. The parties present voted respectively for the candidates proposed, according to the modes they respectively adopted and contended for: and no person has come before the Court suggesting that they are aggrieved by any surprize which has prevented their duly considering the merits of the two candidates then propounded by the aldermen before they proceeded to the election of one of them; but only that the meeting was broken up before all had voted for Mr. *Haworth* (Mr. *Haworth* not being one of the two persons named by the aldermen), who had meant to have voted for him; and no surprise operating to the prejudice of any one elector, supposing the mode of election contended for by the
[335] defendant is the proper one, is complained of in any part of the affidavits: which brings it to the mere question, Which of the two was the valid mode of election? And yet, upon shewing cause, the charter of *J.* 2., the alleged governing charter, is wholly deserted by the prosecutors of the rule, well knowing that, for want of enrolment of the surrender of the antecedent charters supposed to be surrendered, that charter could not be sustained. And feeling also that there was a total destitution of any evidence of acting under that charter of *J.* 2. competent to sustain the supposed acceptance thereof; and also that there was a long continued, and nearly uniform and uninterrupted course of acting under, and in conformity to the charter of 21 *H.* 6., which they were to contend had been surrendered: in this situation, they, instead of that question, for the purpose of discussing which the rule was granted, and which, if it were made absolute, the court had meant to be tried; I say, in lieu of that, other and new questions are brought forward: one of them arising upon the construction of the charter of 21 *H.* 6. as to the meaning of the word *commonalty*, and as to the persons entitled to elect under that denomination in the charter of 21 *H.* 6.: it being now contended that the word *commonalty* does not include the aldermen, by whom, together with

with the burgesses, the election of the defendant was made, but is confined to the burgesses only; and that inasmuch as the aldermen joined in such election with the burgesses, who were alone, as is contended, entitled to vote as *the commonalty*, the election is bad. And another question, as to the want of any due legal notice for the purpose of making an election, even supposing the mode under the charter of 21 *H*. 6. by a previous nomination of the aldermen to be the true one. As to the first of these questions, so newly made; even without resorting to any assistance to be derived from cotemporaneous and subsequently continuing usage for the construction of this charter (to which, however, in such cases, upon the best authorities in the law, resort may allowably be had); it appears, I think, on the face of the charter itself, by a fair construction of it, that the *commonalty* does include the aldermen. It directs the residue of the aldermen to name two burgesses, that one of them might *per communitatem*, be elected an alderman. It does not direct two of the commonalty to be elected by the commonalty, nor two of the burgesses to be elected by the burgesses; and either of these forms of expression would have been natural enough if the aldermen had been meant to be contradistinguished, and excluded by such contradistinction from the electing body; but two burgesses (who bore under that denomination a different corporate character from the aldermen) to be elected by the *community*; that is, as it should naturally and properly seem, by a body composed of and including both the aldermen and burgesses. As to the latter of these questions, viz. the dueness or sufficiency of the notice, and to which it must be recollected that no objection was taken at the time; the objection then being "that it was very unusual to proceed to an election immediately on the nomination of the two burgesses proposed by the aldermen:" and which objection is not supported by the entries; it might have been a matter very proper for consideration if it had been brought before the Court in the first instance, as the immediate and substantive ground for impeaching the election, and admitting it to be otherwise valid: but where it is an objection resorted to as a sort of forlorn hope, after the entire failure of the original ground of application, and for the discussion and eventual trial of which the rule was obtained, it would be no very sound use of the discretion with which we are invested on such subjects to make the rule absolute for the mere trial of this incidental and secondary question; and in so granting

1803.

The KING *against* OSBOURNE.

[336]

[337]

1803.

The King *against* Osbourne.

ing it to enable a party, present at the time and voting under another mode of election, to try upon the same record, along with it, a question which we think ought not to be tried, and the further discussion of which would only tend still more to enhance and continue the inconvenience which must arise to the corporators from countenancing any doubts respecting the validity of that species of corporate constitution which has for so long a period of time subsisted in a course of undisturbed practice and usage within this place. The substantial ground of the original application, therefore, having wholly failed, we think we ought not to grant the rule on this secondary and supplemental ground, if we thought it even stronger and more tenable in the way of objection to the election of the defendant than it appears to us to be.

Rule discharged.

Wednesday, Nov. 16th.

The King *against* Tate.

A swearing in, though defective in law, yet being such whereby the party claimed at the time to be a free burgess of a corporation, held a sufficient user of the office to warrant an information in nature of Quo Warranto against him, and not like a *mere claim* of the office.

THIS was an information in nature of Quo Warranto, calling on the defendant to shew by what authority he claimed to be a free burgess of the borough of *Richmond* in the county of *York*.

It was not disputed but that there was a sufficient question raised by the affidavits on both sides upon the merits of the claim to go to trial, if it appeared that there had been any user of the office by the defendant; but it was objected on his part that there was no such user sufficient to call upon him to defend his title, or to disclaim if he did not. As to which, the facts appeared by the affidavits to be, that this was a borough by prescription, and by charters, *and amongst others, by a charter of Queen *Elizabeth*, wherein she incorporated *the inhabitants* of the borough by the name of the aldermen and burgesses, and
*[338] by another of *Charles* 2. incorporating them by the name of the mayor, aldermen, and free burgesses: and it was not disputed but that the owners of burgage tenements in the borough, and the freemen of certain companies, thirteen in number, had a right to take the liege oath after mentioned, and thereby to become

1803.

The KING *against* TATE.

become free burgesses of the borough; but the right of the inhabitants, householders, resident in the borough, to be admitted free burgesses, was disputed. That on a certain day the defendant and other *inhabitants, householders, resiant* in the borough, tendered themselves before the mayor, recorder, and one alderman, sitting in their corporate capacity, in the place where the court of quarter sessions was holden, and claimed to be sworn in; which is done by taking what is there called the *liege* oath to this effect: that the deponent "shall be a true liege man and true faith bear to the King, and to his power shall aide *and assist the mayor and other officers* of the town; and to them shall be obedient *and attendant*: and shall perform and keep *all such orders and rules as shall be established by the mayor, aldermen, and common council of the town*, and shall not *by colour of his freedom* bear out or cover under him any *stranger*, &c.; but shall uphold all the *liberties and franchises*, &c. of the town and *corporation*." That upon such tender the mayor required to know by what authority they claimed to take the oath; upon which they said that they claimed *as inhabitants, householders, resiants*: but the mayor, denying their right as such, refused to admit them to be sworn, and went away, leaving the recorder and the alderman there. After which the recorder said, that he saw no objection to administering the oath of *allegiance* to these persons; for that if they had no right it would not give it to them: and accordingly the *liege* oath was administered to the defendant and the rest before the recorder and the alderman. No other act of user by this defendant was shewn except the taking of that oath. [339]

Topping and *Walton*, in shewing cause against the rule, contended that the taking of the oath under the circumstances was no user of the office of free burgess by the defendant; for every corporate oath must as such be taken before the chief magistrate of the corporation, according to 3 *Com. Dig.* tit. *Franchises*, F. 29; but before it was administered to the defendant the mayor had departed, and thereby broken up the corporate meeting: and it cannot be pretended, even if the recorder and alderman constituted, without the mayor, the court of quarter sessions, that that court could administer a *corporate* oath. The oath then, being coram non judice, could confer no right, and it is the same as if no oath had been administered. The user therefore is resolvable into a mere *claim* of the office;

1803.

The KING *against* TATE.

which, according to *Rex.* v. *Ponsonby* (*a*), and *Rex.* v. *Whitwell* (*b*) is not a sufficient user to warrant this information. And they read a MS. note of Mr. Just. *Wright* of *Rex* v. *Ponsonby*, wherein it is stated, that *Lee* C. J. *Wright*, *Denison*, and *Fisher*, Justices, "all agreed, that the information should not be against *Ponsonby*, because there was no usurpation; for a claim to be sworn is no usurpation." And Mr. Justice *Buller*, who quotes the same case in his *Nisi Prius* book, refers to the *Queen* v. *Blagden*,* *H.* 12 *Ann.* to shew that defendant cannot plead that he did not usurp, but must either justify or disclaim. It is the more necessary therefore, that before the information be granted against him, the evidence of user should be plain and unequivocal.

[340]

Parke, *Wood*, *Holroyd*, and *Rayne*, contrà, were stopped by the Court.

Lord ELLENBOROUGH C. J. We admit the authority of the cases cited, that there must be a swearing in fact, and that a mere claim to be sworn in is not sufficient to warrant us in letting the information go. The question then is brought to this, Whether a bad swearing in be sufficient? Here the defendant did not merely claim to be sworn in, but has taken the oath in such a way as he thought to be sufficient at the time to make him a free burgess; that is a user: if he abandon his claim now, he must disclaim.

Per Curiam, Rule absolute.

(*a*) Reported in *Bull. N. P.* 211. as of the 25 *Geo.* 2. (*b*) 5 *Term Rep.* 85.

1803.

Friday, Nov. 18th.

The Earl of KERRY *against* BAXTER and Others.

Where to debt on bond the plea, after craving oyer, set out the condition of the bond referring to an agreement consisting of various articles relative to the building of a house by the defendant for the plaintiff, "*conformably* (as the plea set forth) *to the particulars* annexed to the agreement, "*amongst which particulars* such and such things were mentioned," and so setting out divers particulars with reference to the agreement; and then pleading performance generally of all the covenants, &c. *in the above recited agreement contained*: to which there was a special demurrer, assigning for cause that performance was pleaded generally to the agreement, which appeared to be only partially set forth; and that for aught appeared the agreement might contain *negative* or *disjunctive* covenants, to which general performance could not be pleaded: and held such cause of demurrer to be well founded; for, from the defendant having set out certain particulars of the agreement *amongst others*, it was to be intended that some others were not set forth, and there was not even an allegation that the instrument contained *no negative or disjunctive* articles of agreement, even if such a brief method of pleading were admissible. Qd. dubr.

DEBT on bond dated 22d of *January* 1802, for 2000*l.* Plea craving oyer of the bond, and of the condition, which recited articles of agreement of the 29th of **Oct.* 1801 between Lord *Kerry* and *Baxter*, which after stating that *Baxter* was possessed of a certain plot of ground at *Grosvenor* place, &c. under an agreement for a building lease for a term of 87 years, from the 24th of *June* 1801, and had begun to build thereon, and that Lord *Kerry* had commenced a treaty with him to build a house near the said building so begun, witnessed, that in consideration of 100*l.* paid by the Earl to *Baxter*, and of 900*l* agreed to be paid to him in manner therein mentioned, *Baxter* covenanted with the Earl to build him a house on the said plot, &c. conformably to the elevation of the building, and six several plans thereof, signed by the Earl and *Baxter*, and deposited with the Earl, conformably to the *particulars* of the building to the said agreement annexed: *amongst which particulars* it is mentioned, that if any variation should be adopted in the plan there laid down which should be an additional expence to *Baxter*, such expence should be paid by the Earl, but not then, unless agreed to in writing, and not to be inferior to the adjoining houses; the same to be complete by the 25th of *Dec.* 1802; and that *Baxter* should permit the said house to be surveyed by the Earl from time to time while building, and if on such survey the building should be found not to answer to the particulars, &c. it should be made agreeable to the same, or otherwise to be surveyed by two surveyors, chosen one by each of the parties; and in case of their disagreement they to choose an umpire: and that when the building was complete, *Baxter* should at the Earl's cost, execute a lease to him of the same for 28 years, from the 25th of *Dec.* 1802, *determinable as therein after mentioned*, at the rent, and upon the terms and conditions *in the said agreement particularly set forth*, and that *Baxter* should furnish the †Earl with copies of all the plans, &c. besides *those deposited* with the Earl, &c.; and *in the said agreement is contained a proviso*, that in

1803.

Earl of KERRY *against* BAXTER.

case during the building, &c. the Earl should desire to make any alterations in the mode or vary *from the particular of building or workmanship*, and notify the same in writing, such variations should not vacate the agreement, or affect it *further or otherwise* than the said variations. (Then followed other stipulations not material to be set forth). And *in the said agreement is also contained* a proviso, that in case of any accidental omissions in *the said particular plans*, &c. the same should be rectified. And reciting that the other two defendants had agreed at *Baxter's* instance to join him in the bond to the Earl; the condition was, that the bond should be void if *Baxter* should keep *all and singular the covenants, provisoes, conditions, and agreements in the above recited agreement contained*, which were to be kept on his part. And then the defendants plead performance by *Baxter* generally of all and singular the covenants, provisoes, &c.

To this there was a demurrer, assigning for special causes, that the condition of the said writing obligatory refers to certain articles of agreement to be performed by the defendant *Baxter*, for the performance of which the said writing obligatory is made and conditioned; but the defendants have not in their plea *set forth the said articles of agreement*, though they have pleaded performance of the matters therein contained generally; but only so much thereof as is recited in the said condition. And also for that the said articles of agreement for any thing which appears to the Court might contain *negative* or *disjunctive* covenants, to which performance cannot be pleaded generally. And also for that articles of agreement not before
[343] the Court, or in any manner set out in the plea of the defendants, or in the record, cannot by law be pleaded against a bond for securing the performance of such articles. Joinder in demurrer.

Dampier, in support of the demurrer, contended that the plea was bad, inasmuch as it appears by the recital of the condition (referring in particular to certain parts printed in Italics,) that the *whole* of the agreement is not set out; and there is no averment that the whole of it was recited in the condition. If the whole had been set out, the plaintiff might have denied that such was the agreement; and for want of stating the whole, the defendant is not entitled to plead performance generally. For aught appears there may be no such articles of agreement as those set forth,

1803.

Earl of KERRY *against* BAXTER.

forth, and then the bond would be single; and every presumption is to be made contra proferentem; for it lies upon the defendant to clear himself from the obligation of his bond: and the plaintiff ought not to be driven to the expence of setting out the rest of the agreement, without which the cause cannot be tried; though if he had set them out in his replication, the defect might have been cured. It may be said, that all the material parts are set forth; but the Court cannot tell that, and the agreement produced at the trial might be materially different in its provisions from that which appears on the record. Besides, it is evident that all the material parts are not set out; for the work is to be done according to certain *particulars*, which are not stated, and which must be material; but though they were otherwise, yet being incorporated with the condition, a plea of general performance to a condition not wholly set forth is bad. He also referred to *Wimbleton* v. *Holdrip*, (*a*), and *Woodcock* v. *Cole*, (*b*) [344] where a distinction is taken between an obligation condition to do several things in particular, and one conditioned to perform covenants in an indenture, which are all in the affirmative; in the latter case performance may be pleaded generally, without setting out the particular articles performed, but not in the former, where performance of every particular must be shewn. So it was agreed in 1 *Sid.* 50. that a plea of general performance to debt upon an obligation, conditioned to perform covenants in an indenture, is not good without setting forth the deed: for otherwise it cannot appear to the Court, whether some of the covenants may not be in the negative, in which case the plea must be special. And that is confirmed by *Lewes* v. *Ball* (*c*), *Topscot* v. *Wooldridge* (*d*), *Ellis* v. *Box* (*e*), and *Jevens* v. *Harridge* (*f*); and *Plomer* v. *Raine*, *M.* 17 *G.* 3. *B. R.* (*g*).

Barrow,

(*a*) 1 *Lev.* 303. (*b*) 1 *Sid.* 215. (*c*) *Ib.* 97.

(*d*) *Ib.* 425. and 1 *Ventr.* 37. and vide *Carth.* 5. S. P.

(*e*) *Alleyen*, 72. (*f*) 1 *Saund.* 9. Vide n. (1) by Mr. Serjt. *Williams.*

(*g*) *Plomer* v. *Raine*, *M.* 17 *Geo.* 3. (from 17 a MS. note-book of Mr. Justice *Buller.*) Debt upon bond. The plea set out the condition, which was to perform covenants in a certain indenture, and pleaded performance generally, without setting out the indenture. The plaintiff in his replication set out the indenture verbatim, and then demurred; and shewed for cause that the defendant had not shewn how he performed the negative covenants. The defendant joined in demurrer. And after argument by *Buller* for the plaintiff, and *Palmer* for the defendant;

Aston J. The plaintiff says there is such an indenture, and having shewn that indenture, he says, If you had stated that indenture in your plea, still the plea would not have been good, for you could not have pleaded performance in the

1803.

Earl of KERRY *against* BAXTER.

Barrow, contrà, admitted that the cases referred to shewed that the whole substance at least of the articles must be set out, but said that nothing appeared to shew that that was not done in this case, as far as it was possible; for plans of building could not be set out: performance was alleged of the covenants, &c. in the *said recited* agreement, not in the *in part recited* agreement.

Lord ELLENBOROUGH C. J. We cannot so understand it: for it is said, "conformably to the *particulars* of the building to the said agreement annexed; *amongst which particulars*" such and such things are mentioned, which are set forth. From whence we must collect, that the *particulars* were in writing, and that *some* only, *amongst others* are set forth. At any rate this mode of pleading will not suffice, however troublesome and expensive it may be to set out all the particulars, most of which may be nothing to the present purpose. But if I were disposed as a pleader to make an experiment, (though I am not prepared to say that it would have done,) I would at least allege, if the truth bore me out, that there were no negative or disjunctive covenants in the instrument; and then the plaintiff might have replied that there were such. But here not even that has been done. The rule relied on by the plaintiff's counsel is an old rule of pleading, founded in good sense and great convenience, and must be complied with; that in pleading performance of any agreement the whole instrument should be set out on the record; for otherwise when the cause goes to trial, it may become a question
[346] whether the instrument produced in evidence be that which is set forth on the record; and the court may have several instruments put upon them corresponding with the parts set forth, but differing in other material particulars, and would be at a loss to know which was the instrument intended to be pleaded; which inconvenience is avoided by setting out the whole of the instrument in question.

Per Curiam, Judgment for the Plaintiff.

manner you have done: The cases cited by Mr. *Palmer* were, where facts, informally set out by the defendant, were cured by pleading over. But here the plaintiff does not cure it; he shews an indenture, which proves the plea to be bad.

Ashhurst J. If the plaintiff had set out in his replication an indenture in which there were no negative or disjunctive covenants, it would have cured the defect in the plea of not setting out the indenture; but in this case, the indenture set out shews the plea to be bad.

Judgment for Plaintiff.

1803.

The KING *against* BUCKLE.

Saturday, Nov. 19th.

One, not a general trader in silver plate, who sells a piece of plate in a particular instance for a price above the value of old silver, is not therefore a vender of plate within the stat. 31 *G*. 2. *c*. 32. *s*. 6. which enacts that all persons *using* the trade of selling plate, &c. *shall be deemed traders in, sellers or venders of*, plate, &c. and shall take out a licence.

THIS was a conviction of the defendant founded on the statutes 31 *Geo.* 2. *c.* 32. *s.* 4. and 32 *Geo.* 2. *c.* 24. *s.* 1. for selling silver plate without taking out a licence. The information charged that the defendant within three months then last past, viz. on the 23d of *October* 1802, at *P.* *&c.* "did presume "to vend and sell a quantity of silver plate exceeding five pen- "ny-weights in one separate and distinct ware or piece of goods, "without first taking out a licence for that purpose, according "to the form of the statute in that case made, before he so pre- "sumed to vend and sell such piece of goods and ware, contra- "ry to the form of the statutes, &c. by reason whereof, &c. the "defendant hath for his said offence forfeited the sum of 20*l.*" It then proceeded to state the summons and appearance of the defendant, his pleading not guilty, and the evidence given against him; the substance of which was to shew, that the defendant at his house in *P.* on the 13th of *October* 1802, sold an old silver tankard to an innkeeper at *P.* for 8*l.*, which the silvermith who weighed it said was worth that money for use, though he as a tradesman would only give 7 guineas for it. On which the defendant was convicted for the offence charged in the penalty of 20*l.* which was mitigated to 5*l.* 2*s.* 6*d.* &c. And on appeal, the Quarter Sessions confirmed the conviction, subject to the opinion of this Court on the question, Whether the selling of one single article of silver plate above the weight of 5 pennyweights and under 30 oz. constituted the defendant a trader within the stat. 31 *Geo.* 2. *c.* 32. *s.* 6. so as to subject him to a penalty for not taking out a licence?

[347]

Wood was to have argued in support of the conviction, and *Reader* contrà. But

The Court thought the case too clear for argument. This was no trading, but a single act of selling on a particular occasion.

1803.

The King *against* Buckle.

The 6th section (*a*) of the act shews that the penalty was not meant to attach on any persons but those who used the trade of vending plate.

Conviction quashed.

(*a*) This section enacts "that all persons using the trade of selling or " vending gold or silver plate, or any goods or wares composed of gold or silver, &c. " and also all persons employed to sell any gold or silver plate, or any such goods " or wares aforesaid at any auction or public sale, or by commission, shall respectively *be deemed traders in, sellers or venders of* gold or silver plate, *within the* " *intent and meaning* of this act, and shall take out a licence for the same."

*Lang *against* Comber.

Monday, Nov. 21st.

A defendant putting in a plea in abatement in time with an affidavit in the usual form that the promises *contained in the declaration* were entered into, if at all, by others as well as himself; which affidavit was sworn at *Liverpool* on the day of filing the declaration in town, and before the defendant could have seen it; was holden not to be a nullity, so as to entitle the plaintiff to sign interlocutory judgment as for want of a plea.

UPON shewing cause against a rule for setting aside interlocutory judgment signed as for want of a plea, it appeared that the declaration, which was on promises, was filed on the 25th of *June*, and was taken out of the office on the 27th, at which time a plea in abatement was put in by the defendant, with an affidavit, stating in the usual form, " that the promises *contained in the declaration* were entered into, if at all, by certain other persons as well as the defendant." But it appearing that the affidavit verifying the plea was sworn at *Liverpool* on the 25th, the day when the declaration was filed, and consequently before the defendant there could possibly have seen it, it was objected that such an affidavit could not properly be made or received by the Court, and that the plea founded thereon was a nullity.

Wood against the rule. *Scarlett* in support of it.

The Court said, that as the defendant might have had very good reasons for believing that what he swore must accord with the truth, (as from knowledge of the cause of dispute between the parties, or from the communication of the plaintiff's attorney as to the nature of the declaration which would be filed;)

[*348]

'and

1803. LANG *against* COMBER.

and as in point of fact the affidavit did accord with the truth, they could not consider the plea as a nullity, but would leave the plaintiff to his indictment for perjury if he thought he had sufficient grounds to institute it. And they said they were the less inclined to support the objection, because according to the practice requiring a plea in abatement to be put in within four days after the filing of the declaration, it was scarcely possible for a defendant living at so great a distance from *London* to avail himself of such a plea, though it often happened that it might be an honest and proper plea.

[349]

Rule absolute.

HEATON *against* WHITTAKER.

Tuesday, Nov. 22d.

By the rule of Court, *Hil.* 26 *Geo.* 3., if there be a *trial* against a prisoner, he is supersedable unless charged in execution within two terms afterwards: If there be *final judgment* against him *without trial*, (which is what is there meant by *final judgment*) then he is supersedable, unless charged in execution within two terms after such final judgment; inclusive of the term of trial or final judgment respectively.

UPON a rule to shew cause why a writ of supersedeas should not issue to discharge the defendant out of custody of the sheriff of the county of *Warwick* as to this action, on account of his not having been charged in execution in due time; it appeared that he was arrested on the 21st of *November* 1801, on a writ returnable in *Michaelmas* term; the declaration was delivered in *Hilary* term 1802; the cause was tried at the *Lent* assizes; final judgment obtained in *Trinity* term; and the defendant was not charged in execution till *Michaelmas* term 1802. The question turned upon the rule of Court of *Hil.* 26 *Geo.* 3. (*a*), which directs that in all cases *after a declaration delivered* (i. e. against the prisoner in due time according to the first clause of the same rule), " unless the plaintiff shall proceed to *trial* or *final judgment thereupon* within " *three* terms next after such declaration delivered, &c. (including the term of such delivery) the prisoner shall be discharged out of custody, unless, &c. And that in all cases " after such *trial* shall be had or *final judgment* obtained against " any prisoner, unless the plaintiff shall cause such prisoner

(*a*) *R.* & *O. of B. R.*, p. 39, 40.

to

1803. HEATON *against* WHITTAKER

"to be charged in execution within *two* terms (including the "term of such trial or final judgment), next after such *trial* "shall be had or *final judgment obtained*, &c. the prisoner shall "be discharged out of custody by supersedeas," &c.

Clarke shewed cause against the rule, and contended that, taking the two parts of the rule together, (which did not appear altogether reconcileable,) it was sufficient if the prisoner were discharged in execution within *four* terms inclusive after the delivery of the declaration; for by the first clause the prisoner is entitled to his discharge, unless the plaintiff proceed to *trial or final judgment* within *three* terms after the declaration delivered, which was done here; and by the latter part the prisoner is entitled to be discharged, unless charged in execution within *two* terms after *trial or final judgment*, including in both computations the term of such trial or final judgment; and that was also done in the present case. But

Per Curiam, It has been repeatedly determined that *final judgment* there means *final judgment without a trial*. The different parts of the rule apply to different cases; if there be a trial, the plaintiff must proceed to judgment, and charge the prisoner in execution within two terms after such trial; if there be no trial, then within two terms after final judgment. Here a trial was had, and the defendant was not charged in execution within two terms after such trial had.

Reader was to have supported the rule.

Rule absolute.

The KING *against* The Inhabitants of KINGS PYON.

Wednesday, Nov. 23d.

A servant hired for a year, four months before the end of the year being discharged by her master upon a trivial dispute, applied to a magistrate for redress, being desirous of continuing in the service. The magistrate ordered the master to take her back, or pay the whole year's wages. The master refused to take her back, but paid the whole year's wages (but not some wool which he also had agreed to give her if she behaved well.) The servant took the money and tendered herself as a servant to others: held that the contract was thereby dissolved, and no settlement gained under it, as in case of a mere dispensation of service.

AN order of two justices removed *Alice Wheale* from the parish of *Weobly* to the parish of *Kings Pyon*, both in the county of *Hereford*. The Sessions on appeal confirmed the order, subject to the opinion of this Court on the following case.

The pauper proved that she was hired to Mr. *Davies* of *Kings Pyon*, to serve him from *Old May-day* 1800 to *Old May-day* following, at the wages of fifty-five shillings, and (if she behaved well) two pounds of wool. That she served him for about eight months, when a dispute happened with her master about some stockings which had been burnt, and he dismissed her from his service. That she applied to a magistrate, and when before him she was charged by her master with having neglected his feeding pigs by not giving them water, which she denied; and also respecting the burning the stockings. That she was desirous of continuing in her service, but her master refused; and the magistrate ordered her master to take her back into his service, *or pay her the whole of her wages*: that he refused to take her again, but paid her the whole of the money, but not the wool. That the pauper, from the time she received her wages, offered herself as a servant soon after to several persons. On cross examination the pauper admitted she had worn her mistress's stockings once or twice, when she was wet, but that no charge was made against her on that account before the magistrate. The same magistrate who made this order of adjudication joined in the order of removal. The Court thought that the pauper's master, by paying her wages, though he did * not receive her again dispensed with the remainder of her service, and therefore confirmed the order of removal.

*[352]

Williams Serjeant, and *Clive*, in support of the order of Sessions. The question is, Whether the circumstances stated amount to a dissolution of the contract between the master and servant, or only to a dispensation of the service by the master? It was not competent to the master to dissolve the contract

against

1803. The KING against The Inhabitants of KINGSPYON

against the consent of the servant, unless for some just cause; and here no just cause was alleged; and so the magistrate thought to whom the complaint was officially referred; for he ordered the master to take the servant back, or pay her the whole year's wages. He preferred indeed the latter; but that did not make the discharge the less wrongful. And the servant's taking the whole of her wages was no evidence of assent on her part to such a wrongful dismissal; but as *Ashhurst* J. said in *R.* v. *St. Philip* in *Birmingham* (*a*), it was a wrongful act of the master *submitted to*, but not *agreed to* by the servant. That case is not distinguishable in principle from the present. There a servant, eight days before the end of her year, having given warning to her mistress to quit her service at the end of the year, the mistress discharged her on the same day, paying her her full wages, which the servant accepted, but was willing to have staid out the whole year if the mistress would have let her: and this was ruled to be no dissolution of the contract, but only a dispensation of the service. The length of time before the end of the year cannot vary the question, as was said by Lord *Kenyon* in *R.* v. *East Shefford* (*b*); and there the service [353] was dispensed with for thirteen weeks. Nor is there any difference between a dispensation of the service in the middle or at the end of the year (*c*). So in *R.* v. *Lambeth* (*d*), a master, about to quit his house seven days before the end of the year for which the servant was hired, told her he had no further occasion for her services, and paid her the whole year's wages, she being unwilling to leave the service, and her master being otherwise inclined to keep her: this also was holden to be a case of dispensation. And all the cases establish the distinction that nothing but a dismissal for a just cause, or a voluntary agreement to part before the end of the year, will dissolve the contract. And the magistrate had no right to do so, even if he had so intended, which does not appear.

Const, contrà, was stopped by the Court.

Lord ELLENBOROUGH C. J. We are not called upon to say whether the magistrate had or had not a right to discharge the

(*a*) 2 *Term Rep.* 624. (*b*) 4 *Term Rep.* 804.
(*c*) *R.* v. *St. Peter of Mancroft* in *Norwich*, 8 *Term Rep.* 479.
(*d*) 8 *Term Rep.* 236.

servant

servant from her service; it is enough that he proposed an option to the master to take the servant back, or pay her the whole of her wages. The master refused to take her back, but agreed to pay the whole wages, and did pay them: and the servant shewed her assent to the dissolution of the contract by taking the wages and offering her services to other persons. Both parties gave the magistrate the power of dissolving the contract, by shewing their assent to what he directed in that respect. Then after all this could either the master or servant have maintained an action against each other, the one for not performing the remainder of the service, the other for not employing her during that time? This is the true question to be considered; and I should not wish to carry the idea of dispensation farther than it has been already carried; which in many of the cases seems to me to have been stretched as far as ingenuity could go, upon the false idea that the servant had a *right* to acquire in gaining a settlement; as if he must not have a settlement, at all events, in one place or another. I do not mean however to disturb any of the cases which have been already decided; but I am not inclined to carry the decisions further still from the plain words of the act of the 8 & 9 *W*. 3. *c*. 30. which are, that no servant shall gain a settlement "unless he shall *continue and abide in the same service* during the space of *one whole year*." And it seems to me, that when the parties stand in such a situation, that where neither the master can compel the servant to come back into his service, nor the servant can compel the master to take him back, and neither of them have any legal means of compelling redress against the other, there is a dissolution of the contract.

1803. — The KING *against* The Inhabitants of KINGS PYON

[354]

GROSE J. I consider the master as having taken the option given him by the magistrate, and chusing to pay her the whole year's wages then, rather than take her back again: this was purchasing the dissolution of the contract on his part, which she assented to by taking the money and tendering herself to others as a servant.

LAWRENCE J. It is extraordinary that the cases should ever have departed from the plain words of the statute of King *William*, which seem intended to exclude constructive services, by providing that a servant shall not gain a settlement under a contract of hiring for a year, unless he shall "continue *and* [355]

alive

1808.

The KING *against* the Inhabitants of KINGSPYON.

abide in the said service" for "*one whole year*." Now here is nothing like an *abiding* in the service for a *whole* year. In the case of *The King* v. *Thistleton* (a) Lord *Kenyon* said, that the cases in which it had been determined that a settlement was gained, notwithstanding the servant was not in the actual service of the master, proceeded on a supposition that the relation of master and servant continued throughout the year; but if the master had once parted with the control over his servant, and could not call upon him for his service, no settlement was gained; and in *The King* v. *St. Peters* (b) he laid down the same distinction, and held that to gain a settlement the servant must continue liable to serve the whole year. If the pauper be absent with the concurrence of his master, remaining subject to his control, it is a dispensation; but if the master cannot resume the right to the pauper's service, it is a dissolution.

LE BLANC J. We are called upon to carry the principle of dispensation of service further than any of the cases have yet gone. For here both parties go before a magistrate, and agree to leave the decision of their dispute to him; and he, hearing what is urged on both sides, gives an option to the master to take the servant back, or to pay her the whole year's wages; and both parties go away acting as if they acquiesced in that determination of the matter: for the master does not take the servant back again, but gives her her whole year's wages; and she accepts the money, and offers her services to other persons.

Orders quashed.

(a) 6 *Term Rep.* 185. (b) 8 *Term Rep.* 478.

1803.

The KING *against* The Inhabitants of SUDBROOKE.

Wednesday, Nov. 23d.

A yearly servant about a fortnight before his year expired, being too ill to work, his master paid him his *whole* year's wages, when he *left the service* and went to an hospital, and never returned into his master's service: held a dissolution of the contract, and that no settlement was gained by such hiring and service.

AN order of two justices removed *George Peacock* and his wife and daughter, by name, from the parish of *St. Michael* in the city of *Lincoln* to the parish of *Sudbrooke* in the county of *Lincoln*. The Sessions on appeal confirmed the order, subject to the opinion of this Court on the following case.

George Peacock, the pauper, settled at *Sudbrooke*, about the beginning of *May*, 1795, hired himself to Mr. *Fitzhugh* of *Portland Place* by the month, at monthly wages, under which hiring he served near three months, when his master saying he should want him for a continuance, they agreed for a year at twelve guineas wages. The pauper said, he considered the first contract at an end, though he never actually left the service. He lived with Mr. *Fitzhugh* under the yearly hiring till about the middle of *April* 1796, when being too ill of a fever to do his work, his master paid him his whole year's wages, when he *left his master's service*, and went down to the *Lincoln* hospital, and never returned into the service of Mr. *Fitzhugh*.

When this case was called on, *The Court* asked whether it could be distinguished from the foregoing case, which had been just before decided?

Torkington and *Coke*, against the order of Sessions, said that the illness (*a*) of the servant was no cause of discharge from the service; and nothing appeared to shew that either party was [357] desirous of dissolving the contract, as was evidenced in the last case. This therefore fell within the general class of cases, where the receipt of the whole wages by the servant, leaving the service in fact before the end of the year, without any adequate cause of discharge, or by mutual consent putting an end to the contract, has been holden to be evidence of a dispensa-

(*a*) *Le Blanc* J. having noticed that it did not appear in the case that the servant continued ill during the remainder of the year; it was observed that the shortness of the period (about a fortnight) before the end of the year afforded a reasonable presumption that he did; and that fact was not disputed.

tion

1803.

The KING against The Inhabitants of SUDBROOKE.

tion of the service by the master, and not a dissolution of the contract. And they compared this to *Rex* v. *Christchurch* (*a*), where the servant seventeen days before the end of her year, being rendered incapable by illness of further service, was sent at the master's desire to a Mr. *Lemonier*'s house, in another parish, that she might have the benefit of her sister's care, who was a servant there, with directions to bring her back to the master's if Mr. *Lemonier* refused to receive her. Mr. *L.* however took her in for five days, after which she was sent to the hospital. The day after she quitted her master's house she returned there to fetch away her cloaths, when the master paid her the remainder of the whole year's wages, and the pauper considered herself as then discharged, though no words of discharge passed: and this was holden to be only a dispensation of service; and the servant gained a settlement in the master's parish. And they distinguished this from *Rex* v. *Whittlebury* (*b*); for there the pauper, who left his master's house on account of illness, five days before the end of his year, sent to his master for the money, who deducted 1s. on that account, with which the servant declared he was satisfied; and that was holden to be evidence of mutual consent to put an end to the contract before the end of the year.

[358] *Holroyd* and *T. Carr*, in support of the orders, shortly observed, in answer to *R.* v. *Christchurch*, that there the servant was placed with the third person *by the master*, and if that person had refused to take her in, *she was to have returned to the master's house*. And they also referred to *Sheen* v. *Godalmin* (*c*) and *R.* v. *Castlechurch* (*d*), to shew that the payment of the whole year's wages makes no difference; if the servant leave the service before the end of the year, though without any express word of discharge by the master, no settlement is gained. And illness may be a cause for dissolving the contract by agreement, as well as any thing else.

Lord ELLENBOROUGH C. J. If there ever were a statute which required a strict construction, and where the very letter of it should have been abided by, it was this of the 8 & 9 *W.* 3.

(*a*) *Burr.* S. C. 494. 2 *Const.* 507.
(*b*) 6 *Term Rep.* 464.
(*c*) *M.* 10 G. 1. 2 *Const.* 497. and cited in *Burr.* S. C. 69. as of *H.* 12 G. 1.
(*d*) *Burr.* S. C. 68. 2 *Const. c.* 30. 499.

1803.

The KING *against* The Inhabitants of SUDBROOKE.

c. 30. For the poor can receive no greater benefit by one mode of construing it than by another; and yet it is a supposed interest of the poor in extending the facility of acquiring settlements which has introduced so much laxity in the construction of this and other statutes of the same sort; as if they must not have a settlement in some place or another. And therefore these statutes ought to have been construed according to the strict question of right between the two contending parishes, one or other of which is to bear the burthen of maintaining the pauper. That mode of construction however has not been adopted; and the doctrine of a *dispensation of service* has been introduced: but still that has only been allowed where both parties contemplated the continuance of the relation of master and servant. But here [359] the servant being ill and unable to do his work, voluntarily *left his master's service*, as it is stated in the case, before the end of the year, when his master paid him his whole year's wages: we must therefore take it to be not only a ceasing to *abide*, in the words of the act, but a relinquishment of the service altogether. After that, neither party could maintain any action against the other for the affirmance of the contract, or continuance of the service. The servant who had left his master's house and service, could not have maintained an action against the master for not taking him into his service again: nor could the master, who had assented to the other's departure and paid him all his wages, have compelled him to return again. Then if neither had any remedy against the other upon the contract, nor any compulsory means of enforcing its execution, it must be dissolved in point of law. In the case of *The King* v. *Christchurch*, at the time of the servant's departure, both parties contemplated the continuance of the service if the servant recovered; for she was sent to Mr. *Lemonier*'s at the master's desire, and with a request from him to Mr. *Lemonier* to take her in: and if he refused, she was to return to her master's house. I do not overlook the circumstance pressed upon us, that there was an advance of the *whole year*'s wages before the end of the year; but the same circumstance occurred in *R.* v. *Godalmin* and *R.* v. *Castlechurch;* and yet no settlements were there holden to have been gained by the servants who quitted their master's service before the end of the year by mutual agreement.

GROSE J. It may perhaps be difficult to reconcile all the

The KING *against* The Inhabitants of SUDBROOKE.

cases upon this subject; but according to the construction of Lord *Kenyon* (*a*) on the act of King *William*, the relation of master and servant must continue during the whole year; or in the words of the act itself, there must be a *continuing and abiding in the same service during the space of one whole year*, otherwise no settlement can be gained. Now here it is expressly stated, that the servant *left his master's service* and went down to *Lincoln* hospital, having, previous to his going, received his whole year's wages. Then how can we say that the contract *continued*, and that the servant *abided* in the service during the *whole* year.

LAWRENCE J. In the case of the *King* v. *Thistleton* (*a*) it was holden that if the master parted with his control over the servant before the end of the year, that made an end of the contract between them; and in that case and *R.* v. *Castlechurch*, the payment of wages for the whole year was holden to make no difference. Here too the Justices have stated that the servant *left* the *service;* by which we are not merely to understand that he left his master's *house;* for that could not be considered as a *leaving* of the *service* unless the contract were meant to be dissolved. In the *King* v. *Christchurch* it did not appear that the servant left the *service* when she quitted her master's house: she was sent by her master to Mr. *Lemonier*'s, with his request to take her in; and if Mr. *Lemonier* could not take her in, she was to return to the master's house; and *Wilmot* J. there considered, that "the servant's being at Mr. *Lemonier*'s or in the "hospital, was just the same thing as her being kept in the "master's house under his own roof."

[361] LE BLANC J. However we may lament that the words of the statute have been departed from, yet as an extended construction of it has been made in some of the cases, if this came within the words and precise determination of those authorities, we must have abided by them: but unless it be shewn to fall within some precise determination, the Court will not extend the departure still further from the words of the statute. I do not found my opinion upon the mere circumstance of the servant's leaving his master's house to go to the hospital; but I think that the parties came to a determination to put an end to the contract.

(*a*) In *R.* v. *Thistleton*, 6 *Term Rep.* 185.

contract. The servant's illness cannot enable the master to determine the contract; but if the servant chuse on account of illness to go away, illness cannot prevent him from coming to an agreement with his master to put an end to the contract; and the question is whether they did not so agree here? It is stated that he received his whole year's wages, and went away before the end of the year, and went to *Lincoln* hospital, and never returned to his master again. Then are we not to conclude that this was done by mutual consent? The case of *The King* v. *Castlechurch* shews that the payment of the *whole* year's wages makes no difference if the parties agree to put an end to the contract of service before the end of the year. So neither can it make any difference that the cause of this was illness: for though illness would not enable *one* of the parties alone to put an end to the contract, it might still induce them *both* to come to such an agreement: and here they did so.

1803.

The KING *against* The Inhabitants of SUDBROOKE.

Both orders confirmed.

The KING *against* The Inhabitants of HOOE.

Wednesday, Nov. 23d.

The pauper *took* a tenement at 11*l.* a year, which he occupied, still receiving parish pay for six months after, having previously agreed to underlet to another a part for 5*l.* a-year, which other *guaranteed* to the landlord the payment of the rent, without which he would not have let to the pauper? but the pauper paid the whole rent for the first year: held that this was a *coming to settle* upon a tenement of 10*l.* a-year within the 13 & 14 *Car.* 2. *c.* 12., by occupying which for 40 days irremoveable the pauper gained a settlement; though the Sessions concluded from the whole of the case that *credit* was given by the landlord to the pauper *for* 6*l.* *a-year only of the rent*, and that for the residue the credit was given to the guarantee: for if the pauper were legal tenant of the whole, it was immaterial whether *credit* were given him for the *rent.*

TWO Justices by an order removed *John Akehurst*, *Mary* his wife, and their seven children, by name, from the parish of *Pevensey* to the parish of *Hooe*, both in the county of *Sussex*. The sessions, on appeal, confirmed the order, subject to the opinion of the court on the following case.

The pauper was originally settled in the parish of *Hooe*: and immediately previous to the hiring in question of the premises hereinafter mentioned occupied a house in *Hooe* belonging to *John Pococke*, at the rent of 4*l.* of which the parish,

[*362]

from

1803.

The King *against* the Inhabitants of Hooe.

from the inability of the pauper, paid forty shillings. At *Lady-day* 1803, the pauper took of the said *Pococke* a house in *Pevensey*, with certain rights of common annexed to it, at the rent of 11*l*. per ann.; but what the extent of those rights were, the pauper, when examined, did not happen to know: *Pococke* being at that time overseer of the poor for the parish of *Hooe*. The pauper took possession of *Pococke*'s house at *Pevensey* a few days after Lady-day, and continued to occupy it till the time of the removal. The period of *Lady-day* 1801 was a time of scarcity, and the parish of *Hooe* continued to give relief to the pauper for six months after he went to reside at *Pevensey*. The pauper was unable to purchase cattle to turn out on the common. The cause of the pauper's taking *Pococke*'s house was, that he had an opportunity of engaging in a contract with one *Porter* in carrying chalk coastwise; by which he earned above 60*l*. for himself, a man, and a boy, employed in navigating the vessel, in the course of a year. Previous to the pau- [363] per's contracting with *Pococke*, *Porter* had agreed with the pauper to take part of the premises under him, and to pay him for it 5*l*. per ann. *Porter* was desirous of having the pauper in his employ, and was the first person who made application to *Pococke* for his house. Previous to its being let, *Pococke* said he would not let the house except *Porter* would guarantee the rent. *Porter* therefore consented to guarantee to *Pococke* the payment of the pauper's rent, but at the time the pauper made his contract with *Pococke*, *Porter* was not present; and *Pococke* then said expressly that he made his agreement with the pauper only, and considered none but him as his tenant. The pauper paid the whole of the rent for the first year, by instalments at different times, and part of the rent for the year following, the rest remaining unpaid. It appeared that the pauper would not have hired the premises, at *Pevensey* unless *Porter* had agreed to take part of them under him, at the rent above mentioned; and *Pococke* did not consider the pauper of sufficient credit and ability to hire the premises in question, if *Porter* had not guaranteed the payment of the rent. The Court was distinctly of opinion that none of the parties to the contract acted with any fraudulent intention whatever; but that upon the whole of the facts, credit was given by the landlord to the pauper for 6*l*. only of the rent; and that, for the residue thereof, the credit was given solely to the said *Porter*.

Erskine

1803.

The KING against The Inhabitants of HOOE.

Erskine and *Newland*, in support of the rule, relied principally upon the fact stated in the case, that *credit* was given by the landlord to the pauper for 6*l.* *only* of the rent; which was in effect finding that though the premises were nominally let to the pauper, yet in effect he was only tenant of 6*l.* a-year, credit *being given for the rest of the rent to *Porter*, by whom it was to be occupied in the first instance. This is different therefore from a case where the party is tenant of the entire premises, though he may be required to give collateral security for the rent, and though the inducement to the landlord to let to him may be the getting such security. But the Sessions have by their finding in effect negatived that there was a letting of the whole to the pauper. The case which comes nearest to this, and which may be cited by the other side, is *R.* v. *Fillongley*, (*a*) where an estate which the pauper's brother suffered him to occupy at will without rent, out of charity, was deemed sufficient to confer a settlement. But that is plainly distinguishable; for whatever the motive may be, it is sufficient that the pauper has credit enough to be entrusted with the entire and exclusive possession of a tenement of 10*l.* a-year; or in the words of the stat. 13 & 14 *Car.* 2. *c.* 12. that he *comes to settle* in such a tenement; his ability in the event to pay the rent forms no ingredient in the question of settlement. Now here it appears from the whole of the case, and the finding of the Sessions, that the pauper never had *credit* for, and never *came to settle* upon a tenement of 10*l.* a-year value; for he originally agreed with *Porter*, before the bargain with *Pococke*, that *Porter* should have part of it of the value of 5*l.* a-year, and *Pococke* gave credit to *Porter* for so much of the rent in the first instance, and never gave credit to the pauper for more than 6*l.* a-year. They concluded by observing, that from the statement of evidence instead of facts, the case was very perplexed; and pressed the Court, if they had any doubt, to send the case back to have the fact distinctly found, whether the whole tenement were let to the pauper, or only so much of it as he occupied, and for the rent of which he had credit. [The Court were at first inclined to adopt this suggestion; but postponed their determination till they had heard the counsel against the orders.]

*[364]

[365]

(*a*) 1 *Term Rep.* 458.

1803.

The KING against The Inhabitants of HOOE.

Garrow, *Courthope*, and *D'Oyley*, contrà, said, that enough appeared on the face of the case, contradictory as it was in parts, to shew that the pauper gained a settlement in *Pevensey*; for it is stated that *he took of* Pococke *the house* &c. in *Pevensey*, *at the rent of* 11*l. per annum*; that *he took possession of it* a few days afterwards; that *he* agreed to *underlet* part to *Porter*; that *Porter* was to *guarantee* the rent; which shewed that the pauper was answerable in *the first* instance, though it is afterwards stated that *credit* was only given to the pauper for 6*l.* of the yearly rent; and *Pococke* himself said, that he made his agreement *with the pauper only*, and considered *none but him as his tenant*; and lastly, what is decisive, the *whole* rent for the first year was in fact *paid by the pauper*. The amount of all the other facts, or rather evidence stated, is no more than this, that *Pococke* would not have contracted *with the pauper*, as he did, except for the *collateral guarantee* of *Porter*; which may be admitted; and still the taking of the whole being by the pauper, and he being liable to the landlord in the first instance, it is clear by all the authorities that he must be considered as the tenant; and *coming to settle* upon a tenement of 10*l.* a year value, and residing there forty days, he gained a settlement. Nothing is said in the statute either of the *credit* or the *ability* of the tenant; nor can the Court enter into the motive or inducement of the tenant to take, or the landlord to let the pre-

[366] mises. The case of *Rex* v. *Fillongley* (*a*) was much stronger than this, if the credit and ability of the tenant were material to be considered; for there the pauper, who was settled by the fact of taking and residing on such a tenement, was a professed object of charity at the time, and the cultivation of the farm was actually carried on by his brother. But at any rate the negativing that *credit* was given to the pauper in this case for more than 6*l.* a year is evidently confined to credit for the *rent*, and not for the *tenement*; as it is expressly found that he *took the tenement of Pococke* at 11*l.* a year; and therefore being legal tenant of the whole, if he had had no credit at all for any part of the rent he would equally have gained a settlement.

Lord ELLENBOROUGH C. J. Notwithstanding the case is not so intelligibly framed as it might have been, enough appears to enable us to decide upon it. The first thing to be

(*a*) 1 *Term Rep.* 458.

done

1803.

The KING *against* The Inhabitants of HOOE.

done is to refer to the words of the statute on which the question depends. The stat. 13 & 14 *Car.* 2. *c.* 12. gives authority to two justices on complaint within 40 days after any person "shall *come to settle* in any tenement" under 10*l.* a year to remove him. No doubt this was a *coming to settle* by the pauper. Then it says "upon any *tenement*;" that includes the character of tenant in which he comes to settle, which is the principal question here; and then the value, which must be 10*l.* a year to confer a settlement; and here the value of the entire premises was 11*l.* a year. Now as to the principal question, the pauper was to all intents and purposes tenant of the legal estate for the whole: fraud being excluded by the Sessions. He was liable to all the liabilities of a tenant. It is stated that the pauper *took* the premises of *Pococke at the rent* of 11*l.* and *Pococke* said that he demised to the *pauper only.* [367] Then shall it be said that he had not the whole interest in him because a surety was required for the rent. Having such a surety has been holden to make no difference (*a*). But it is said that the only inducement to the landlord to let to the pauper was the circumstance of having such security, and therefore credit was not given to the pauper. But so a man's inducement to take a bill of exchange may be that he has the security of the drawer and indorser as well as the acceptor; and yet he may still give the latter credit. Then where there is a tenement of sufficient value, and a tenant not removable, who is liable to all the burthens of a tenant, and has all the rights of one, and against whom, as such, every proceeding in law may be had, he gains a settlement by forty days' residence on such tenement.

GROSE J. There is no difficulty in the case when the facts are properly ascertained. The pauper removed from the parish of *Hooe* into the parish of *Pevensey;* and the question is, Whether, in so doing, he can be said to have *come to settle* in a tenement of the annual value of 10*l.* in that parish? Of the value of the tenement there is no doubt; and that he took possession of it. But it is said that he had not *credit* for more than 6*l.* a year of the rent. But I am satisfied with the explanation which Lord C. J. *Parker* gives of the statute in a pass-

(*a*) Vide *Butley* v. *Benhall*, *Burr.* S. C. 107.

1803.

The KING *against* The Inhabitants of HOOE.

age quoted by Mr. Justice *Buller* in *R.* v. *Fillongley* (*a*), from the case of *South Sydenham* v. *Lamerton* (*b*); Lord C. J. *Parker*, having first said that the settlement depends on the *value* of the tenement, not on the *rent*, proceeds thus: "The *reason of the statute is this, that a man who is entrusted with "a tenement worth 10*l.* a-year is of such *credit*, and must have "such a stock, as makes him not likely to become chargeable "to the parish." The question then is, whether this man were *trusted with a tenement* of 10*l.* a-year value? To which the facts stated in the case give a decisive answer. For it is stated that the pauper took the house, &c. of *Pococke* at the rent of 11*l.* per annum; that he took possession of it, and occupied it, for above forty days; during which time, being irremoveable, he gained a settlement. Certain facts, however, have been introduced into the case in order to raise a question whether he were able to pay the rent for it? If that were material, other facts shew that he could; for he actually did pay the first year's rent. But it was not necessary that he should have paid it; it was sufficient that he had credit to be trusted with a tenement of the annual value of 10*l.* Let me suppose a pauper taken out of a workhouse, who obtains credit enough upon the collateral security of a friend for the payment of the rent, to take a house of 10*l.* a year, which he immediately after lets out again in lodgings for the purpose of gaining a livelihood, and continues the holding for above 40 days; all fraud apart, there could be no doubt of his gaining a settlement. It was not necessary for the tenant to have paid the whole rent; for though the rent were paid by others, yet as he had credit for the whole premises it was sufficient: and he shewed that he deserved that credit in the present instance; for he actually paid the whole rent. Therefore having taken a tenement at *Pevensey* at a rent of 11*l.* per annum, and taken possession of it, and paid the rent, it is clear that he gained a settlement there.

[*368]

[369] LAWRENCE J. It is not attempted to be argued upon the facts of the case, such as they ought to have been returned to this court upon the evidence laid before the Quarter Sessions, that the pauper did not gain a settlement at *Pevensey*: but it is said, that upon the statement before us we must suppose

(*a*) 1 *Term. Rep.* 461. (*b*) Cited from *Bott.* 356.

some

1803.

The KING against The Inhabitants of HOOE.

some fact, in order to give a settlement there, which the Sessions have not found, namely, that the pauper rented the entire premises; because they have concluded that credit was only given to him for part of the rent. And from thence it is argued, that unless credit were given to the pauper for 10*l.* a-year in value of the rent, no settlement can be gained by him. But I do not know that that is a necessary conclusion. The stat. 13 & 14 *Car.* 2. *c.* 12. gives power to the justices to remove, on complaint within 40 days, any person "who shall *come to settle* in any tenement *under* the value of 10*l.* &c. unless certain things are done which are required by that statute;" but they have no power given them to remove any person coming to settle in a tenement of that value, or upwards. Such a person is not submitted to their jurisdiction at all. The question therefore is not a question concerning the *credit* of the party, but whether in point of fact he came to settle, i. e. acquired the interest of a tenant in a tenement of that value; for if he did, the justices had no power to remove him. Now upon the facts stated, it is apparent that the pauper had an interest to that amount in a tenement as the tenant thereof, which prevented him from being an object of removal.

LE BLANC J. It is not creditable to the records of the Court to have such a case as this returned upon them: and but for the sake of saving further expence to the parties, we should [370] have sent it back to be restated more correctly. At present the whole argument has turned not on the facts of the case, but upon the evidence and observations with which it is perplexed. And at first view it seemed that the latter clause, stating that "credit was given by the landlord to the pauper for 6*l.* *only* of "the rent," &c. had thrown an obscurity over the whole, which called for an explanation from the Sessions; but upon further consideration, it being expressly stated, that the tenement was taken by the pauper, and a *guarantee* required of *Porter*, which imports that the pauper was the real tenant, and this again confirmed by the fact found that *Porter* had agreed to take part of the premises to the value of 5*l.* a-year *under the pauper;* but that the landlord would not have let the premises at all to the pauper without the guarantee of *Porter;* (from all which facts the Sessions appear to have drawn a conclusion that credit was only given to the pauper for 6*l.* a year, out of the 11*l.* and that credit was given to *Porter* for the remainder:)

I think

1803

The King *against* The Inhabitants of Hook.

I think sufficient appears to enable us to see what facts and conclusion the Sessions meant to submit to our review. And we must, I think, take them to have found that though the pauper had taken the *whole tenement* of *Pococke*, yet that from the guarantee of *Porter*, who was himself to occupy part under the pauper for 5*l.* a-year, the Sessions thought that this in effect was an agreement to relieve the pauper from the responsibility of so much of the rent, leaving him only liable for 6*l.* a-year, and that that would not confer a settlement on him. But that is founded on a mistake in point of law; for it is immaterial whether credit were given to the pauper for the rent, if he were the tenant of the whole premises.

Both Orders quashed.

Thursday, Nov. 24th.

*Izett *against* Mountain.

Where a carrier gives notice to his customers that he will not be accountable for any parcel, &c. *of more than 5l. value, unless entered as such and paid for accordingly;* if a parcel be sent above that value, without being entered and paid for as such, and it be lost, the owner is not entitled to recover any thing.

THIS was an action on the case against a carrier, in the common form, for not delivering goods undertaken to be carried from *London* to *Edinburgh*, to which the general issue was pleaded. The goods were proved to be of the value of 22*l.* 5*s.*, and were sent to the warehouse of a certain inn in *London*, from whence the public coach of the defendant by which they were to be conveyed set out, and were there deposited by the plaintiff's servant, and booked in the ordinary way at the common price, without being entered or paid for according to their value, as being above 5*l.* The defence was the following general notice published by the defendant, together with others, and stuck up in the warehouse at the inn where the goods were deposited: "The proprietors of coaches from this "inn will not be accountable for any parcels, &c. of more value "than 5*l.* unless entered as such, and paid for accordingly." And the question was, Whether the plaintiff were entitled to recover even the 5*l.* upon the authority of the case of *Clay* v. *Willan* (*a*), which was relied on against his title to recover any thing. But it having been suggested that a similar case of *Grey* v. *Clarke* was now pending in *C. B.* upon which a doubt was

(*a*) 1 *H. Blac.* 298. and vide *Yate* v. *Willan*, 2 *East*, 128.

*[371] entertained

1803.

IZETT *against* MOUNTAIN.

entertained by some of the Judges of that court, whether the plaintiff were not entitled to recover to the extent of the 5*l.*; in order to give an opportunity of looking into that case, Lord *Ellenborough* C. J. at the Sittings after last term at *Guildhall*, suffered a verdict to be taken for the value of the goods, subject to be reduced to 5*l.*, or to be altogether set aside and a nonsuit entered, if there appeared to be no authority for the doubt suggested. A rule nisi was accordingly obtained on a former day for entering a nonsuit, which Lord *Ellenborough* C. J. then said ought to have been had at the trial, as no doubt could be made upon adverting to the terms of the contract in this case that the plaintiff was not entitled to recover any thing. And his Lordship asked the plaintiff's counsel whether it were worth while to contest the rule.

Erskine and *Marryat* for the plaintiff desired time to look into the cases; and on this day they admitted that they could not sustain the verdict.

Garrow and *Bedford* were to have supported the rule for entering a nonsuit.

Per Curiam, Rule absolute.

*LEICESTER and Another *against* ROSE.

Thursday, Nov. 24th.

A trust deed is proposed to the creditors at large of an insolvent, whereby they all engage to accept payment of their *whole* debts by certain instalments, the first four of which are to be *guaranteed* by collateral security, the two last to remain *upon the single security* of the insolvent: several of the creditors refuse to sign unless the plaintiffs do, and the plaintiffs stipulate privately with the insolvent as the condition of their signature that he shall procure them collateral security for *the two last instalments* as well as the prior ones, conceiving that they had collateral security originally to cover their debt; and upon the faith of such private agreement they sign the general trust deed, which is then signed by the rest of the creditors; held such private agreement a fraud upon the other creditors, and void, although the effect of it were not to secure to the plaintiffs the payment of more money than the other creditors were to receive, but only further security for the same sum.

THE plaintiffs declared, that before the making of the agreement after mentioned a certain deed of trust, dated 6th of *August* 1801, had been prepared between *W. Thompson*

*[272] and

1803.

LEICESTER *against* ROSE.

and *E. Leadbeater* of the first part, *B. Shawe* and *W. Borrowes* of the second part, and certain creditors* of *Thompson* and *Leadbeater* of the third part; whereby, after reciting that *Thompson* and *Leadbeater*, being unable to make present payment of the whole of their debts, had proposed to their creditors [*373] to pay them by instalments, viz. 1-8th in one month, another eighth in three months, another in six months, another in twelve months, 2-8ths in eighteen months, and the remaining 2-8ths in twenty-four months; and that to secure the second, third, and fourth instalments *Thompson* and *Leadbeater* were to give their promissory notes indorsed, half of them by *Shawe* and Co., and the other half indorsed by *Borrowes* and Co. (those houses having agreed to become sureties for *T.* and *L.* to that amount respectively, upon having certain counter securities after mentioned given to them); and that to secure the two last instalments *Thompson* and *Leadbeater* were to give their own promissory notes. And they were also to assign to *Shawe* and *Borrowes* their estate and effects as well to indemnify the respective houses of *Shawe* and Co. and *Borrowes* and Co. what they might be called upon to advance, as also for securing to the creditors at large the payments of the two last instalments; it was witnessed that *Thompson* and *Leadbeater* did, by consent of their creditors, assign to *Shawe* and *Borrowes* their estate and effects in trust for the before-mentioned purposes; the surplus, if any, to be paid to *Thompson* and *Leadbeater*. The declaration then stated, that before and at the time of making the agreement and promises next mentioned, *Thompson* and *Leadbeater* were indebted to the plaintiffs in 1765*l.* and thereupon the 3d of *September* 1801, by a certain agreement between the plaintiffs and the defendant, reciting that the first-mentioned trust-deed had been proposed to the creditors of *T.* and *L.*, and in part car- [374] ried into execution by the signatures of many of the creditors; *and that the plaintiffs having been applied to sign the same as creditors of* T. *and* L. *had declined executing it*, conceiving that they had a remedy for their demand against other persons jointly with *T.* and *L.*; *in order to induce the plaintiffs to sign the said deed*, the defendant agreed that he would within six weeks procure security to the satisfaction of the plaintiffs, to be given to them *for payment of the two last instalments, &c. amounting to* 10*s.* *in the pound*, agreed to be paid in the trust-deed by the notes of *T.* and *L.* only; the former instalments amounting to 10*s.* in the pound being to be paid in a manner satisfactory

satisfactory to the plaintiffs; *in consideration of which agreement of the defendant, the plaintiffs agreed to sign the said trust-deed* in respect of their said debt. It then stated that after the said agreement, in consideration that the plaintiffs at the instance of the defendant had promised to fulfil the agreement on their part, the defendant promised to the plaintiffs to perform his part of it: and then it averred that *Thompson* and *Leadbeater* being indebted to the plaintiffs at the time of the agreement in 1765*l.*, the two last instalments, for which the defendant agreed to procure security, amounted to 441*l.* 5*s.*, of which the defendant had notice; but though the plaintiffs had performed their part of the agreement, yet the defendant on his part had not procured any security to the plaintiffs for the payment of the said two last instalments, &c. by means whereof, the first of the instalments still remains due and unpaid, &c. To this the general issue was pleaded.

1803.

LEICESTER *against* ROSE.

At the trial before Lord *Ellenborough* C. J. the substance of the facts set forth in the declaration were proved; and it was also proved that upon the first application of *Thompson* and *Leadbeater* to their creditors to sign the trust-deed of the 6th of *August* 1801, several of them, particularly three mercantile houses in *Liverpool*, refused to sign it unless the plaintiffs, who were some of the creditors, first signed it. This was made known to the plaintiffs by *Thompson*, who answered that it was in vain to apply to them to sign it unless they (*T.* & *L.*) got collateral security for them (the plaintiffs) for the two last instalments as well as those which were to be secured by the deed; whereupon *Thompson* and *Leadbeater* promised to procure such security, and prevailed upon the defendant to make the promise stated in the declaration. And then the plaintiffs having signed the deed, the three other houses, on seeing the plaintiffs' signatures to it, signed it also; but without any knowledge, as far as appeared, of the promise of collateral security which the plaintiffs had obtained. On the 9th of *February* 1803, the day when the first of the two last instalments payable by *Thompson* and *Leadbeater* became due, application was made by the plaintiffs to them for payment of their note, which was refused; and on the 26th of *May* the defendant was formally called upon by the plaintiffs' attorney for the promised security, which he declined to give. His Lordship being of opinion that the collateral security thus obtained by the plaintiffs, unknown to the other creditors, was a fraud upon them, within the

[375]

1803. LEICESTER *against* ROSE.

the principle of the case of *Cockshot* v. *Bennett* (*a*), and that class of cases; and that the promise by the defendant was therefore made upon a bad consideration and void, non-suited the plaintiffs.

A rule *nisi* was obtained on a former day for setting aside the nonsuit, and granting a new trial, principally on the ground [376] that the additional security obtained by the plaintiffs in this case *did not alter the condition of the insolvents*, on which ground it was said that the former cases had proceeded: and the case of *Feise* v. *Randall* (*b*), was particularly relied on as sustaining this distinction, and governing the present case.

Garrow, *Gibbs*, and *Lawes*, shewed cause, and contended that the principle on which the further security to the particular creditor had been set aside in the former cases was not because it altered the condition of the insolvent merely, but because it was a fraud upon the other creditors, who agreed to give up part of their demands, or postpone the time of payment, upon the faith that all the creditors were upon the same equal footing, and that no better terms could be obtained by each standing out and bargaining for himself. That was considered to be the true *effect* of the agreements in those cases. But this case is still stronger; for here there was *express evidence* that the other creditors refused to sign the deed of trust unless the plaintiffs set them the example, which was made known to the plaintiffs; by which it is impossible to understand that they meant a mere nominal accession to the deed, but a *bonâ fide* stipulation to abide by the terms of it upon an equal footing with the rest of the creditors; and therefore it was a direct fraud upon those creditors, for the plaintiffs, while they nominally held out their agreement to the deed, which would induce the other creditors to sign it, and thereby bind them from suing the insolvents, and running a race for priority, privately to obtain a farther security for their debt beyond what they had [377] all of them stipulated to take in the trust deed. If each of the creditors had known that it was in the power of the debtors to have given better terms to one of them, there would have been a fair competition with the plaintiffs which of the creditors should obtain the preference. There is no difference in reason

(*a*) 2 *Term Rep*. 763. (*b*) 6 *Term Rep*. 146.

and

1803.

LEICESTER *against* ROSE.

and substance, whether the further advantage privately obtained by the particular creditor consists of a larger sum, or of better security for the same sum, than the rest. The cases of *Cockshot* v. *Bennett* (a) and *Jackson* v. *Lomas* (b) went expressly on the ground of a fraud on the creditors in general; though in each there was a further sum to be paid by the insolvent to the particular creditors. So in *Jackson* v. *Duchaire* (c). *A* having given *B* a certain sum for goods in advancement of *C*, a secret agreement between *B* and *C*, that the latter should pay *B* a further sum for the goods, was holden to be void; not merely on the ground that *C*'s situation was thereby altered for the worse, but expressly because it was a fraud upon *A*. Then the case of *Feise* v. *Randall* (d) is relied upon as an authority to shew that a particular creditor may procure an additional security from a third person for the same sum which the other creditors are to receive from the debtor himself. It is however observable that that case was determined upon motion, without much discussion; that the authority of the former cases was fully recognised, which it seems difficult to reconcile with it upon principle; and above all, it was decided on the assumption that the further security taken was no fraud upon the rest of the creditors; which cannot be said of the security in this case, where the other creditors expressly refused to accept the terms offered by the deed, unless the plaintiffs first agreed to them. [378] The cases of *Sumner* v. *Brady* (e) and *Smith* v. *Bromley* (f) may be considered as having proceeded on the policy of the Bankrupt Laws, in contravention of which those agreements were made; the one a security given to induce a creditor to withdraw his petition against the allowance of a certificate; the other to recover back a sum of money paid for obtaining one; but this was also considered as a fraud upon the other creditors as well as an oppression upon the bankrupt.

Erskine and *Wood*, in support of the rule. This case comes directly within the authority of *Feise* v. *Randall* (g), which was subsequent to all the other cases, and which was distinguished from them upon the broad principle that the particular creditor was to receive no more than the rest of the

(a) 2 *Term Rep.* 763. (b) 4 *Term Rep.* 166.
(c) 3 *Term Rep.* 551. (d) 6 *Term Rep.* 146.
(e) 1 *H. Black.* 647. (f) *Dougl.* 3d edit. 696. (g) 6 *Term Rep.* 146.

creditors

1803.

LEICESTER *against* ROSE.

creditors, and the insolvent himself stood exactly in the same situation after the additional security given as before. It can be no fraud, (says the Court in that case,) upon the rest of the creditors, that another person had agreed to join his security to the debtor's for the payment of the same sum that all the rest were to receive. That is the very case now in judgment. This does not contravene the principle of the former cases, which went, it is true, upon the ground of fraud against the general creditors; but the fraud was considered to consist in this, that after all had agreed from compassion to the debtor, or any other motive, to sacrifice a part of their claims, or to suspend the enforcement of them to a future period, in order to render the debtor free from all existing incumbrances, or render him more able to discharge them, it should not be permitted to any particular creditor to impose more burthen- [379] some conditions on the debtor, and thereby defeat the object which the general creditors had in view in assenting to forego the extent of their claims. That principle applies especially to cases where the particular creditor stipulates to receive a larger sum than the rest, as was the case in *Cockshot* v. *Bennett* (a) *Jackson* v. *Duchaire* (b), and *Jackson* v. *Lomas* (c). But here the creditors at large were to receive their *whole* demand; the only advantage they abandoned was with respect to the time of payment: and this disadvantage is not diminished to the plaintiffs by the further security; but they stand in no better condition than the others, either with regard to the amount of their debt or the acceleration of payment. The other creditors have relinquished nothing which the plaintiffs have not also relinquished. But with regard to the only further benefit obtained by the plaintiffs, the collateral security for the payment of the two last instalments, they were fairly entitled to it, because by adopting the trust-deed and giving time to the debtors, they lost the collateral security which they claimed to have before. There was no meeting or express stipulation by these plaintiffs with the other creditors that they would not obtain this security, nor did the obtaining it abate any advantage which the others were to derive from the trust-deed. So neither was the situation of the debtors altered: for they were at all events liable to pay the money once; if they paid it themselves the defendant could not be

(a) 2 *Term Rep.* 763. (b) 3 *Term Rep.* 551. (c) 4 *Term Rep.* 166.

called

called upon for the money; and if he paid it, the debtors were liable over to him instead of to their original creditors.

1803.

LEICESTER *against* ROSE.

*Lord ELLENBOROUGH C. J. From the first mention of this case to the present moment I have never entertained a particle of a doubt upon it. The question is whether any legal effect can be given to an agreement by which these creditors, the plaintiffs, are to have a better security for the same sum than the rest of the creditors, after having entered into an agreement with them, importing that the same satisfaction was to be made to all by the same mode of payment. And as that satisfaction was not to be paid at the time in money, but in securities payable at a future day, it made a great difference to the creditors whether they were to rest on the insolvents' security alone, perhaps a desperate security, or to have other solvent persons to resort to, if necessary: so that it might make the difference of payment, or no payment: and in that light it seems to have been considered by the Plaintiffs themselves. In *Feise* v. *Randall* the Court are stated to have said that the agreement there made with the particular creditor was no fraud upon the rest, I must therefore presume that the case was so presented to the consideration of the Court, and that they decided it on that supposition on the first view of it. But is there no fraud on the rest of the creditors in this case? Was there no fraud even in the minds of the plaintiffs at the time? They were told that other creditors would not sign the trust-deed unless they did so; and yet they bargained for better security as the ground of their signing it; and when they did sign the deed purporting to accept the same security as the rest, they had in fact got a better security: while the other creditors, induced by the plaintiff's example, signed it in simplicity, and in confidence that no better terms were to be had by any of them. Therefore, though this be not like some of the cases mentioned where security was obtained by the particular creditors for *more* than the others were to receive, yet the principle of all of them is the same, that where the creditors in general have bargained for an equality of benefit and mutuality of security, it shall not be competent for one of them to secure any partial benefit or security to himself. This is the *effect* of all that has been said in those cases; and every one who recollects the strong impressions made upon the mind of the noble and learned Judge, who presided here during the

*[380]

[381]

1803. LEICESTER *against* ROSE.

period of those determinations, may suspect that if this case, which ranges itself so precisely within the principle of those, had been presented to him for his opinion, he would at once have decided against the plaintiff's claim. In *Feise* v. *Randall* there was no rule to shew cause granted; the case therefore was not sufficiently expanded to the consideration of the whole Court, so as to establish a precedent, which should break in upon the authority of the former decisions, which were more maturely weighed: and all that I consider that case as having determined is, that there was no fraud there against the other creditors: and here I consider that there was fraud. I will not go upon the idea of this being a fraud or oppression upon the compassion of friends to persons in distress, which was thrown out in one (*a*) of the cases alluded to; for in all cases of obtaining collateral security, something of that sort is to be found. Coupled with the facts in that case, perhaps the expression may have been warranted: but in truth all collateral security may in some sense be said to be extorted from the benevolence of friends, without any impeachment of its validity. But the ground I go upon is, that this agreement was a fraud against the rest of the creditors.

[382] GROSE J. The question is, Whether any fraud were worked on the other creditors of *Thompson* and *Leadbeater* by this agreement on which the plaintiffs now seek to recover? Now observe what the agreement originally made was. Collateral security was to be given for the several instalments mentioned in the trust-deed, except the two last, and those were agreed to be secured by the promissory notes of the insolvents themselves, payable at a distant day. Then if those were the terms agreed upon between all the creditors and the insolvents, it was a fraud upon the other creditors for the plaintiffs to secure to themselves any other better terms; because if the other creditors had known that better security was to be had, they might not have agreed to accept what they did. It is plain that they meant to govern their conduct by what the plaintiffs did: they refused to sign the trust-deed unless the plaintiffs signed it: that shewed that they intended to be upon the same footing with the plaintiffs. This therefore falls within the same principle as the other cases, of fraud on the other creditors. As to

(*a*) *Smith* v. *Bromley*, *Dougl.* 697. *n.*

Feise

Feise v. *Randall*, it went off upon a motion for a new trial, Lord *Kenyon* conceiving that there was no fraud on the other creditors; and as his Lordship, before whom the cause had been tried, was of that opinion, the rest of the court were induced to concur.

1803.

LEICESTER *against* ROSE.

LAWRENCE J. The facts of this case leave no doubt of the principle which ought to govern it. Several of the creditors of these insolvents had refused to sign the trust-deed which was tendered to them, unless the plaintiffs first signed it: and their motive in signing it afterwards undoubtedly was, that they considered that the plaintiffs, by signing it, had acceded to the terms of payment therein held out, which therefore they thought it fit that they also should accept. If, then, the plaintiffs, by their act induced others to sign the deed upon an idea that the plaintiffs were satisfied to take the same security as the rest, while they had privately stipulated for something more, it is a fraud upon the other creditors. In *Jackson and another* v. *Lomas* (a), *Buller* J. says, that "the foundation of the agreement was, that the plaintiffs should execute the deed of trust," the execution of which "was done with a view of signifying to the other creditors that the plaintiffs had come in under the deed. But the general principle is, that a secret agreement of this kind made between the insolvent and some of the creditors, in order to induce the rest of the creditors to agree to the composition, is void." That is this very case. Upon the authority therefore of that decision, the execution of the trust-deed must be considered as an agreement by each of the creditors that all of them should come in pari passu under the trust deed; and this being a secret agreement by the plaintiffs, in fraud of the general agreement, to secure a partial benefit to themselves, is therefore void.

[383]

LE BLANC J. It is agreed in all the cases, that if there be a fraud upon the general agreement of all the creditors by a particular stipulation with any of them, it is void: and the only contest has been as to what shall be said to constitute such fraud. It has been supposed to consist in one stipulating to receive more *money* than the others; but that is a fallacy: for the real question is, Whether he be put in a better situation than he

(a) 4 *Term Rep.* 170.

1803.

LEICESTER *against* ROSE

*[384]

stipulated for with the other creditors at large? and it is immaterial whether that be done * by receiving more *money*, or that which is meant to procure him more money, namely, a better security for the same sum. This case only differs thus far from the others, that this is not a deed of *composition* in the common acceptation of the term, because it provides that every creditor shall ultimately receive his full demand: it is more like a letter of licence, being merely to give time. But it is clear upon the face of it that the creditors at large were not satisfied with the personal security of their debtors; for they required collateral security for a part of their demands. Such being the agreement, whether entered into at a meeting of all the creditors assembled for the express purpose, or impliedly by their affixing their signatures to the same deed carried round to each separately and signed by all; is it not a fraud upon the creditors at large if the plaintiffs, having holden out to them that they would come in under the general agreement, have, notwithstanding, stipulated for a further partial benefit to themselves? And there is no difference in substance whether a creditor stipulate for that which he thinks will produce him money more certainly, or for a larger sum of money than he had agreed to take in common with the other creditors: it is equally a fraud upon the other creditors to stipulate for either. This opinion militates indeed with the case of *Feise* v. *Randall:* but if that had been considered as a fraud at Nisi Prius, or had been presented in that shape to this Court, it would have received the same determination as the other cases which have been referred to. For it makes no difference in what respect the particular creditor is benefited more than the rest; if he be so benefited, they do not all come in pari passu.

Rule discharged.

1803.

BUTTERFIELD, qui tam, &c. *against* WINDLE and Another.

THIS was an action of debt brought in *London* against the defendants, dealers in coals, to recover certain penalties under the stat. 3 *Geo.* 2. *c.* 26. The first count, which was framed on the fourth section (*a*) of the act, alleged that the defendants, after the 24th of *June* 1730, and within six calendar months next before the suit commenced, viz. on the 19th of *October* 1802, in the parish of *St. Dunstan in the West* in the city of *London*, they the defendants being dealers in coals, did knowingly *sell* to *T. Wood* a certain quantity, viz. five chaldrons of coals, pool measure, as and for a sort of coals which they really were not: viz. as and for a sort called the best *Wall's-End* coals; when in fact the said coals so sold by the defendants were not really the said sort called the best *Wall's-End* coals, but were coals of another and different sort, description, and quality, which they the defendants at the time when they so sold the said coals to the said *T. W.* in the parish of *St. Dunstan* aforesaid, &c. well knew; contrary to the form of the statute, &c.; whereby the defendants forfeited 500*l.*, &c. The second count (to which there was no objection), which went for a penalty of 100*l.* on the 10th sect. of the act, alleged a sale to *T. W.* by the defendants of five chaldrons of coals *as and for pool measure*, i. e. such measure as then was and still is usually given and allowed in the pool or river *Thames*, * including the ingrain thereof, after the rate of one chaldron in every score bought on board ship, and so in proportion, &c. according to ancient custom in the port of *London*, as described in the stat. 3 *Geo.* 2.; and stated a delivery by the defendants to *T. W.* of a parcel of coals as and for five chaldrons of coals pool measure; and then alleged that the defendants did not justly and without fraud *deliver* to *T. W.* the buyer thereof the full quantity of five chaldrons pool measure so sold to him by the defendants, and accordingly measured from on board ship to the defendants by the meter, together with the ingrain thereof, according to the form of the statute, &c.; but the said parcel of coals so sold by the defendants to *T. W.*, and delivered to him, were, at the time of the said delivery to

The offence of *selling* coals of a different description than those contracted for, upon the stat. 3 *Geo.* 2. c. 26. s. 4. is complete in the county where the coals are *delivered*, and not where they were contracted for; the contract not being for any specific parcel of coals, but for a certain quantity of a certain description. But the *not justly measuring* such coals is a local omission of a local act, required by the 13th section of the act to be performed at the place where the coals are kept for sale, at which place* the bushel of Queen *Anne* is required to be kept and used for the purpose of measuring the coals into sacks of a certain description, in which they are to be carried to the buyer; and therefore the offence is local, and must be laid in the county where the coals were put into the sacks without having been so *justly measured*.

(*a*) "Every person who shall knowingly sell one sort of coals, for and as a sort "which they really are not, shall for every such offence forfeit 500*l.*"

1803.

BUTTERFIELD qui tam *against* WINDLE

*[387]

to the said *T. W.*, deficient in the said full quantity and measure, &c. viz. in 34 bushels and a half, &c. contrary to the form of the statute, &c. The fourth count, framed on the 13th section (*a*) of the act, for a penalty of *50*l.*, charged that the defendants on the 19th of *October* 1802, in the parish of *St. Dunstan in the West* aforesaid in the city of *London*, they, the defendants, being *dealers in and sellers of coals by the chaldron or lesser quantity within ten miles round the cities of* London *and* Westminster, *viz. at the parish of* St. Dunstan in the West *aforesaid in the city of* London, did *sell* to *T. W.* by the chaldron a certain other quantity of coals as and for five chaldrons of coals pool measure as aforesaid, and afterwards, to wit, on, &c. in the said parish of *St. Dunstan*, &c. *did deliver* the said last-mentioned coals to the said *T. W.* as and for five chaldrons of coals pool measure as aforesaid; nevertheless the defendants *did not justly measure* the said coals so by them sold and delivered to the said *T. W. with a lawful bushel*, to wit, such a bushel as is described in the stat. 12 *Anne*, (st. 2. c. 17.) but omitted so to do, contrary to the form of the statute, &c.

At the trial of this case before Lord *Ellenborough* C. J. in *London*, the facts appeared to be shortly these; *Wood*, who lived in *London*, went on the 19th of *October* 1802 to the wharf of the defendants, which was situated in *Middlesex*, and there, without agreeing for any specific parcel of coals, gave a general order for five chaldrons of *Wall's-End* coal (considered to be the best sort) to be sent to his house in *Fetter-Lane*. The coals were afterwards sent in sacks contained in two waggons, and were delivered at his house in *London*, but were upon

(*a*) "All dealers in and sellers of coal by the chaldron or lesser quantity, "within the cities of *London* and *Westminster*, or within ten miles round, shall "constantly keep and use at their respective wharfs, warehouses, and other "places for the sale of their coals, a lawful bushel, such as is described in the "stat. 12 *Ann.* st. 2. *c.* 17., with which bushel all such dealers in and sellers of "coals shall justly measure or cause all the coals they shall so sell by the chal-"dron or lesser quantity to be measured, and shall put three bushels of coals *so* "*justly measured* into each sack before described (*s.* 11.), which said sacks they "shall use, and no other, for the carriage of such coals to the buyers thereof: "and that all such dealers in and sellers of coals within the said limits who shall "not constantly keep and use such a bushel and such sacks, &c.; or shall not so "fill their coal sacks from such bushels, or shall otherwise offend against the "true intent and meaning of this act, shall for every such offence forfeit 50*l.* "And if any servant, &c. of such dealer in coals shall fill such coals into sacks "without *first* duly measuring the same by such bushel, such servant, &c. shall "for every such offence be committed to the house of correction, &c. for not less "than 14 nor exceeding 30 days."

examination

examination and re-measurement found to be of an inferior quality, and also deficient in quantity: but no evidence was given of their having been actually measured before they were put into the sacks at the wharf. The plaintiff obtained a ver-*dict for penalties on the 1st, 2d, and 4th counts. To the verdict on the second count no objection was made; but a rule nisi was obtained for setting aside the verdict on the first and fourth counts, upon the ground that the causes of action, if any, in those counts appeared by the evidence to have arisen in *Middlesex*, and not in *London*, in which the venue was laid: and another rule nisi for arresting the judgment on the 4th count, (if the other objection should not prevail), on the ground that the offence in that count contained, of not justly measuring by the bushel of Queen *Anne*, as required by the stat. 3 *Geo. 2. c.* 26. on which that count was framed, was repealed by the stat. 7 *Geo. 3. c.* 23. which required the use of another bushel described in the stat. 16 & 17. *Car. 2. c.* 2. in the measuring of coals within the limits of the city of *London* where the venue was laid. In the result however it became unnecessary to enter into the question in arrest of judgment.

1803.

BUTTERFIELD qui tam *against* WINKLE.

*[388]

Gibbs and *Marryatt* now shewed cause against the rule for a new trial; admitting that the venue must be laid in the county where the offence was committed, they contended as to the first count that the *sale* which constitutes the offence as laid in that count, was not complete till the *delivery*, which was in *London*. The order was not for any specific parcel of coals then contracted for by *Wood* on the defendant's promises in *Middlesex*; but generally for such a quantity of coals of the quality described; till delivery therefore it was open to the defendants, by the terms of the contract, to have sent to *Wood* any lot of coals answering to that description. Even after the coals sent had proceeded into *London* in the defendants' waggons, it was competent to them to have recalled the lot any time before actual delivery, and to have sent another in its stead. [389] The word *sell* in the statute (*a*) cannot apply to an *executory* contract to sell, but to an actual sale; for the object of the statute 3 *Geo. 2. c.* 26. was to prevent fraud; and if the con-

(*a*) 3 *Geo. 2. c.* 26. *s.* 13. "All dealers in and sellers of coals shall justly measure "all the coals they shall so *sell* by the chaldron," &c. under a penalty of 50*l.*

 tract

1803. — BUTTERFIELD qui tam *against* WINDLE.

tract were not *executed*, none could be defrauded by it. At best the offence was only inchoate in *Middlesex*, where the order was given; but it could not be consummated before delivery, when only it could appear that the defendants had not done that which the statute required of them. Then as to the objection to the fourth count, the offence consists in *not* having *justly measured* the coals *before delivery*; it is a *negative* act, and must therefore be transitory till the delivery; till when the evidence of the negative does not conclusively arise: for it did not appear that the coals were measured at all in *Middlesex*, and at any time before delivery it was competent to the defendants to have measured the commodity, and to have supplied the deficiency. They might have measured the coals as they were shot into *Wood's* premises, and proceeded with the delivery till the proper quantity was dealt out. But even if the offence arose partly within the two counties, the plaintiff might lay his venue in either.

Erskine and *Harrison* contrà. As to the first count, the venue ought to have been laid in the county where the contract for the sale was made; for the object of the act was to prevent fraud in the coal trade, in the inception of the contract and during its progress towards completion; the generality of consumers have seldom either leisure or opportunity to detect it
[390] after delivery of the article. The delivery, though it may furnish evidence of fraud in the execution of the contract, is no part of the contract of sale itself, and the offence may exist without it, although it may be more difficult to prove the fraudulent intent in making the contract before delivery: but as on the one hand a delivery of a different sort of coal from that contracted for, by mistake of the dealer's servant, would not make him guilty of the offence; so if he were detected in the very fact of wilfully sending inferior coals to those agreed for, in their transit to the buyer, the evidence of fraud in the sale would be complete, though the commodity had not reached its place of destination; and it is admitted, that if a specific parcel of coals had been agreed for at the time of the contract of sale, the offence, though evidenced by the delivery of a different sort in *London*, would have been complete in *Middlesex*, where the contract was made. To say in that case that there was still a locus penitentiæ before delivery, after such evidence of fraud, would be to say that there was a locus penitentiæ after detection;

1803.

BUTTERFIELD qui tam *against* WINDLE.

detection; for the fraudulent delivery is the detection of the antecedent offence. The evidence of the offence may arise in one county, though the offence itself were committed in another; and the trial must be had in that county where the thing prohibited was done. If it had been intended to make the fraudulent *delivery* the offence, the penalty would have been given against any person who should *deliver* to the buyer any other sort of coal than that sold to him. At any rate, if delivery be necessary to the perfection of the sale, the offence, when completed by delivery, would relate back to the contract of sale which was the foundation of the fraud. If indeed this were an *action* for damages for a breach of contract in not delivering coals of the sort contracted for, it would be an answer to the action for the dealer to shew a delivery of the proper commodity, though he had before attempted to impose upon the buyer another sort; for then the plaintiff could not prove himself to have sustained any damage. But this is to recover a penalty for the *offence* of *selling* one sort of coal for another, the gist of which is the *attempt* to defraud, though no actual damage ensue to the buyer. Then as to the fourth count *the not justly measuring;* though the offence be of a negative kind, yet it must necessarily be tried in the county where the thing required is directed to be done, for the omission of which the penalty is inflicted. Now the statute requires the measuring to be done at the wharf or other place for the sale of coals, where the bushel with which such measurement is to be made is required to be *constantly kept;* and the coals are to be measured into the sacks described, which sacks and no others are to be used for the purpose of carriage to the buyer. The seller then is not at liberty to measure the coals at any place or time, but at the particular place where the coals are kept for sale, and before they are put into the sacks for carriage. If it were otherwise, the check on frauds would be nearly done away. And the locality of the offence is the more material in this case, because the stat. 7 *Geo.* 3. *c.* 23. which was passed for the regulation of the coal-trade in *London* alone, (excluding *Westminster*) is still more particular in the requisitions for measuring the coals upon the spot from whence they are to be carried, which is to be done (by s. 10.) in the presence of a labouring meter at the wharf, &c. who by s. 11. is to give a token to certify such admeasurement; and a different penalty is given by s. 12. for sending coals in carts from such wharfs, [391] [392]

&c.

1803.

BUTTERFIELD qui tam *against* WINDLE.

&c. without such a ticket; and by s. 21. no seller of coals within the limits mentioned in that act is to be liable to the penalties under the 3 *Geo.* 2. *c.* 26.: and the stat. 26 *Geo.* 3. *c.* 108., which was in force at the time of this offence committed, contains similar provisions in s. 11 & 22, to those before mentioned contained in the 7 *Geo.* 3.

Lord ELLENBOROUGH C. J. There are two counts, the first and fourth, which require distinct consideration. As to the first, there is no doubt that in order to perfect a sale of that commodity which is not previously ascertained between the buyer and the seller before delivery, and where the commodity sent from the one to be conveyed to the other might, without any breach of contract, be subtracted in its passage, and other goods of the kind contracted for sent in its place, the sale and delivery must be considered as taking place at the same time, and that in truth the sale is not perfected till the delivery. Then the delivery of the coals having been made in *London*, the venue is well laid on the contract stated in the first count. This disposes of the objection to that count. As to the 4th, which is framed on the 13th sect. of the 3 *Geo.* 2. *c.* 26. for selling and delivering coals *without having justly measured them with a lawful bushel* (i. e. of Queen *Anne*); upon a view of the whole clause, it must have been the meaning of the Legislature that the measuring should take place antecedent to the putting the coals into the sacks described in a former section (the 11th); because it requires the sellers justly to measure the coals with the bushel of Queen *Anne*, which bushel they are required constantly to *keep and use at their* respective *wharfs*, and to
[393] put three bushels of coals *so justly measured into each* sack, *which sacks* and no other shall be used *for the carriage of such coals to the buyers thereof;* and then it goes on to subject to imprisonment the servants of such dealers in coals who shall *fill such coals into sacks*, without *first* duly measuring the same. Now as the putting the coals into the sacks for the purpose of conveying them to the buyers must necessarily be at the wharf or other place where the coals are kept, and where the bushel with which the admeasurement is to be made is required to be constantly kept and used, and as the measuring is to take place *before* the coals are put into the sacks; for they are to put the coals *so justly measured* into the sacks; it follows that the not justly measuring the coals is a *local* omission of a *local* duty, which

which in this instance was required to be performed in *Westminster*, where the defendant's wharf was situated from whence the coals were taken, and where they ought to have been measured before they were sent to the place of their delivery; and therefore, the venue being laid in *London*, that count cannot be supported.

GROSE J. As to the offence charged in the first count; till delivery the identical coals sent to the buyer could not be said to be *sold;* for those which were sent might have been recalled any time before delivery, and others sent in their stead: the sale and delivery therefore must be considered as one act. But the question as to the fourth count is very different. The *not justly measuring* is, as my Lord has properly described it, a *local* omission of a *local* act. And on looking through the statute it appears that there are several *local* acts required to be done, such as the dealers in coals keeping and using the bushel of Queen Anne for the measurement of the coals at their wharfs and other [394 places for the sale of coals, and sacks of certain dimensions for the carriage of them afterwards to the buyers.

LAWRENCE J. The question upon the first count is, Where the *sale* was complete? and that I take to have been at the place of delivery. For the statute was not meant to punish the mere intention to defraud, but the persons who actually committed a fraud in furnishing the consumers with a different sort of coal from that which they bargained for. Now here that which passed between the buyer and sellers in *Westminster* was not an actual sale of a specific parcel of coal, but a contract for the sale of a quantity of coal of a particular description: to complete a *sale* the particular commodity must be ascertained which is the subject of sale; otherwise if there be only an engagement to deliver a certain quantity answering to such a description, that is not a *sale*, but a *contract* merely for sale. If the defendants had not delivered any coals at all, or coals of another sort, the party contracting to buy might have brought his action against them for the breach of contract in not delivering *Wall's-End* coals, but he could not have maintained trover for any specific parcel of such coal in the defendants' possession at the time. The rule in the Digest is this: Si id quod venierit appareat quid quale, quantum sit, & pretium, et purè venit, perfecta est emptio. (Lib. 18. tit. 8. De periculo

1803. | BUTTERFIELD qui tam *against* WINDLE.

periculo et commodo rei venditæ.) But until it appears what it is that is sold, it is not *perfecta*, and therefore no sale. I also agree with my brothers in what they have said as to the fourth count. On that branch of the statute (13th s.) the sale makes no part of the offence; the offence there is the *not justly measuring*. The act * [395] requires that all the coals sold within certain limits shall be measured in a particular manner, namely, by a certain bushel, into sacks of a particular description: the measuring therefore was meant to be before the coals were put into the sacks; and that having been done in *Middlesex*, the trial should have been had there.

LE BLANC J. Upon the first count the objection is that the sale was complete in *Middlesex;* it is material then to see what was done there. The defendants contracted there to sell to *Wood* five chaldron of *Wall's-End coals;* that was no offence; for it did not then appear but that they would sell him *Wall's-End* coals. And supposing they meant to do otherwise, and had prepared other coal to send him, yet if they repented of it before delivery, they might still have performed their contract; for till delivery it had not appeared but that they might have delivered coals according to the terms of their contract. The delivery then was the perfection of the sale, and that was made in *London*. As to the fourth count, the defendants are entitled to have the verdict found for them, upon the want of proper venue; for the offence laid in that count was complete in *Middlesex*. The 11th s. directs, that no dealer in coals within the limits shall carry coals to the buyer but in sacks of certain dimensions sealed and marked. The 13th clause then directs, that all dealers shall keep and use at their respective wharfs, and other places for the sale of their coals, a certain bushel such as is described in a statute of Queen *Ann*, and that they shall measure the coals with that bushel before they are put into the sacks. Now couple those directions with the facts of this case.
[396] The coals were here sent from a wharf in *Middlesex* to be delivered to *Wood* in *London*. Then according to the act they ought to have been measured at the wharf before they were put into the sacks in which they were conveyed, and that was in *Middlesex*. And though, if upon re-measurement of the coals in *London* they were found to be deficient, there might be *evidence* arising in *London* that they had not been justly measured, yet that would

would be evidenced that they had not been so justly measured in *Middlesex*, where the offence was committed.

1803.

BUTTERFIELD qui tam *against* WINDLE.

Verdict to be entered for the defendants on the fourth count, and for the plaintiff on the first and second.

KELLNER *against* LE MESURIER.

Monday, Nov. 28th.

A policy on a foreign ship must be understood as containing an exception of all captures made by the authority of our own Government. A clause in a ship policy at and from *Lisbon* to *Cadiz*, and at and from thence to *Flushing*, at a premium of 20*l.* per cent. to return 8*l.* per cent if the ship insured sailed with convoy from *Cadiz* for *England* and 2*l.* pr. ct. more for convoy from *England* to *Flushing*, or 10*l.* per cent. if with convoy for the voyage, *and arrived*, does not entitle the assured to a return of premium of 8*l.* per cent. in consequence of the ship's arrival merely in *England* with convoy from *Cadiz*, being afterwards captured before her arrival at *Flushing*: for *arrived* means *at the ultimate port of destination* Q. If no interest be averred, it is sufficient under the stat. 19 *Geo. 2. c. 37. s. 2.* to state that the ship was foreign when the policy was underwritten and the loss happened, without stating the ship to be such when the risk commenced.

THIS was an action on a policy of insurance made the 11th of *September* 1794 by the plaintiff therein described, *as agent*, being the person residing in *Great Britain* who received the order for and effected the policy, which policy was on the ship *Princess Louisa*, lost or not lost, "*at and from* Lisbon *to* Cadiz, *and at and from thence to* Flushing;" at and after the rate of 20 guineas per cent, *to return* 8*l. per cent if the ship sailed from* Cadiz, *with convoy for* England, *and* 2*l. per cent. more for convoy from* England *to* Flushing or 10*l. per cent.* if *with convoy for the voyage*, AND ARRIVED." In the declaration it was averred that the ship was not at the *time of making, effecting, or subscribing* the policy, *nor of the happening of the loss* *after-mentioned, the property of or belonging to the King or any of his subjects. And that the ship on the 11th of *September* 1794 sailed from *Lisbon* on her said intended voyage, and afterwards on the 27th of *September*, arrived at *Cadiz*, and on the same day sailed and departed *from* Cadiz *with and under convoy for* England, in prosecution of her said intended voyage, *and arrived;* and that afterwards and during the said intended voyage *and before the same could be completed*, to wit, on the 29th of *January* 1795, the said ship was *taken as prize* by our Lord the King, and was wholly lost to the proprietors thereof; by reason of which the defendant became liable to pay to the plaintiff the amount of his insurance, *and to return and repay to* him

1803.

KELLNER *against* LE MESURIER.

him 8*l.* so agreed by the defendant to be returned *if the said ship sailed from* Cadiz *with convoy for* England, and *arrived, &c.* To this there was a demurrer and joinder: and the following were alleged as special causes of demurrer; that it is not alleged, nor does it appear that the plaintiff, or any person on whose behalf or for whose account the insurance was made, had any interest in the said ship, nor what person was interested therein. Nor does it appear that the ship at the time of her *departing from Lisbon*, or at the beginning of the adventure insured, was not the property of or belonging to the King or any of his subjects.

The case was elaborately argued in *Trinity* Term last by *Giles* in support of the demurrer, and *Holroyd* contrà: but the Lord Chief Justice, in giving judgment, entered so fully into the consideration of the principal points on which the arguments turned, that the detail of them may properly be dispensed with. At the close his lordship observed, that as the most material point would come again under discussion in another case of [398] *Gamba* v. *Le Mesurier*, (*a*), which stood in the paper for argument, the Court would postpone giving any opinion till they had heard counsel in that case.

Lord ELLENBOROUGH C. J. now delivered the opinion of the Court. This was an action upon a policy of insurance made the 11th of *September* 1795, by the plaintiff, *as agent*, upon the ship *Princess Louisa* "*at and from* Lisbon *to* Cadiz, *and at and from thence to* Flushing." The premium is stated to be "*at and after the rate of 20 guineas per cent., to return 8l.* "*per cent. if the said ship or vessel sailed from* Cadiz *with con-* "*voy for* England; *and 2l. per cent. more for convoy from* "England *to* Flushing; *or 10l. per cent. if with convoy for the* "*voyage, and arrived.*" The declaration contains no averment of interest in any particular person; but alleges "*that the* "*ship was not at the time of making, effecting, or subscribing* "*the policy, nor of the happening of the loss, the property of or* "*belonging to the King or any of his subjects.*" This allegation was made in order to take the case of this ship as far as the allegation in question is competent for the purpose, out of the provision of the stat. 19 *Geo.* 2. *c.* 37. *s.* 1., whereby assurance, *interest or no interest*, "on any ship belonging to his Majesty or any of his subjects," is prohibited. It is to be observed that

(*a*) Vide the next case, p. 407.

this

1803.

KELLNER *against* LE MESURIER.

this allegation predicates nothing as to the property in the ship from the time of the *commencement of the risk* covered by the policy, but only from a subsequent period, that of effecting the policy (*a*). The declaration then *states, that the ship departed from *Lisbon*, and arrived in safety at *Cadiz*; and afterwards departed *from* Cadiz *with convoy for* England in prosecution of her voyage, and *arrived*: but that afterwards, and *before her voyage could be completed*, she was *taken as prize by his Majesty*, and wholly lost. To this count upon the policy of assurance there is a demurrer, and a joinder in demurrer; and upon the argument thereof several questions have been made. One is, Whether any return of premium be demandable under the policy in the events which have happened, of a departure of the ship with convoy from *Cadiz* for *England*; the ship *not having afterwards arrived at* Flushing, where the voyage was to terminate? Upon this point we are of opinion that no return of premium is demandable within the meaning of the policy; no arrival at *Flushing*, the ultimate port of destination, having in this case taken place. That the words, "and *arrived*," annex a condition which over-rides and governs equally *all* the several stipulations contained in the policy for a return of premium in the events of a sailing with convoy for the different parts and subdivisions of the voyage; that is to say, the return of 8*l*. per cent. for sailing *from* Cadiz *with convoy for* England, and 2*l*. per cent. more *for convoy from* England *to* Flushing, as well as to the return of 10*l*. per cent., the sum total of these several returns, for a sailing with convoy for the whole voyage. By inverting the order of these three different provisions respecting returns of premium, and taking the last first, it will place the matter in a clearer point of view. The stipulation about premium and its return will then stand thus; at and after the rate of 20 guineas to return 10*l*. per cent. if the ship *sail with convoy for the voyage and arrives*: if *from* Cadiz *with convoy for* England, 8*l*. per cent.: and 2*l*. per cent. more *for convoy from* England *to* Flushing. In this mode of arranging the provisions respecting returns of premium, the word *arrived* is naturally in point of construction carried forward and united successively

*[399]

[400]

(*a*) Vide *Nantes* v. *Thompson*, 2 *East*, 386. where the averment was, "that the "ship was not, at the time of effecting the policy, nor of the happening of the "loss after mentioned, *nor at any other time*, the property of the King," &c. and vide an equivalent averment in *Crawford* v. *Hunter*, 8 *Term Rep.* 14.

with

1803.

KELLNER *against* LE MESURIER.

with each branch of these provisions, and operates plainly as a condition equally affecting them all. Indeed it is impossible to assign a reason why the total amount of the two several parts of the premium thus divided and appointed, with reference to the risks of the two several parts of the voyage, should be made returnable only upon the event of arrival at the end of the voyage; and why the several parts of the premium should respectively be made returnable on account of the mere sailing with convoy for the respective parts of the voyage, independent of the same event of ultimate arrival: and this too when the underwriter should ultimately have derived no benefit from such partial convoy, but should still have a total loss to pay.

Another point was made, Whether the allegation respecting the property of the ship shewed it to have been foreign during the whole period of the risk insured, so as to render the one entire risk, in the manner in which it was insured, a valid subject of insurance within the stat. 19 *Geo.* 2. *c.* 37. *s.* 1.? And next, supposing the allegation in question not to be sufficient for that purpose, then, Whether it may not be rejected as surplusage? which depends on this question, viz. Whether any allegation on the subject were at all necessary to be made on the part of the plaintiff, and whether it were not incumbent on the defendant to have shewn that the property was not insurable in virtue of the provisions introduced by that statute, by analogy to the statute of frauds and the cases on common law pleadings which have been cited as in respect to that statute? in other words, Whether the stat. 19 *Geo.* 2. has [401] rendered any other mode of declaring on the subject of interest necessary than what was usual and deemed sufficient before that statute?

The last and principal point which was made on the part of the defendant, (assuming that the ship in question has been well insured as a foreign ship without any averment of interest,) was this, Whether an insurance upon a *foreign* ship, underwritten *generally against capture* by a *British* subject, be a valid insurance, competent in point of law to charge such *British* underwriter *in the event which has happened*, that is to say, *of a capture of such ship by his Majesty?* And inasmuch as we are of opinion in favour of the defendant upon this latter ground of objection to the action, it renders it wholly unnecessary for us to consider the two immediately preceding questions, which relate to the sufficiency of the allegation in the declaration

ration, in respect to the property in the ship, as being foreign, and the necessity in point of law which the plaintiff might or might not be under to have made any allegation at all on the subject. As to the last ground of objection to the validity of this insurance, it immediately involves this question, and has been properly so argued, viz. Whether an insurance made in its terms *against capture generally* can be legally carried into effect, so as to operate as an indemnity against an act of hostile capture on the part of his Majesty and his subjects, in favour of an enemy, (for such the proprietor of this ship must be taken to be at the time of the capture in question); the ship having been, as alledged, *taken as prize* by his Majesty, and which primâ facie imports that it was duly so taken? And upon full consideration of the subject we are of opinion, that this last ground of objection is well founded, and that no action can be maintained upon this policy to recover the loss in question. A policy containing an insurance *against* British *capture eo nomine*, would be illegal, and void upon the face of it, as being directly and obviously repugnant to the interest of the state, having an immediate tendency to render ineffectual to the extent of the indemnity created thereby all offensive operations by sea, adopted on the part of his Majesty and his subjects, for the purpose of weakening the strength and diminishing the resources of the enemy. And if an insurance by a *British* subject, made in terms, *against* British *capture*, would be void, an insurance indirectly producing the same effect, by the application afterwards of the *general* terms of the insurance to the particular event, (i. e.) of *British* capture which has since happened, must, we are of opinion, upon principle be equally illegal; and that no peril, the subject of insurance, can be covered under the generality of the terms "*capture*," "*detention of princes*," or the like, which could not, consistently with law, be specifically insured against in direct and express terms. Every particular, to which the general term is in the sense and meaning of the parties and consistently with the law applicable, may be considered as virtually comprehended within the scope of such general term. If therefore *capture* by a *British* force were, and consistently with law could be, meant as one of the risks insured against under the word *capture*, we may consider this description of risk for all purposes of construction as actually inserted in the body of the policy itself; but what would be the legal effect of a direct assurance against

1803.

KELLNER *against* LE MESURIER.

[402]

1803.

KELLNER *against* LE MESURIER.

British capture, we have expressed already. Indeed all words of similar generality with the word *capture* which are to be found in the policy, as "*arrest and detainment of princes*," "*all other perils*," &c. must be understood with this exception
*[403] *and qualification annexed to them, (i. e.) that the law of the country to which the assurer belongs be not contravened, and its essential interests prejudiced by the application of them to any particular case sought to be covered thereby; for otherwise, as the loss of enemies' property by an act of hostility on our part might be indemnified to the enemy by the one term, so losses incurred by legal seizure, in the course of a smuggling adventure, might be indemnified to the smuggler by the other; as indeed any other description of marine peril which might be incurred in the course of any enterprize whatsoever of an illegal nature, besides those already specified, might be indemnified to the adventurer under the words "*other peril*." Whatever opinions (*a*) may heretofore have obtained in favour of the expediency of allowing insurance to be made upon enemies' property against capture, and whatever attempts may have been made to procure any legislative declaration or provisions in support of them, neither those opinions, nor any degree of weight, authority, and zeal with which they were attended, have gone the length of producing one single judicial determination in favour of the legality of such a practice: indeed its legality never was in any one instance immediately and distinctly brought into judicial question and argument at the periods alluded to, or at any time since. The practice has subsisted in such extent as it has hitherto prevailed merely upon the mutual good faith and confidence of the several parties to such contracts. When the objection is taken, as it of late has been in several instances, it necessarily requires to be treated in the
[404] same way as any other question of law: and consistently with the rules of law it appears to us that the objection ought to prevail. A recent judgment of the Court of Common Pleas, in the case of *Furtado* v. *Rogers*, 3 *Bos. & Pull.* 191. has in substance decided against the legality of such a contract; in the general grounds of which judgment I entirely agree. And the full

(*a*) Alluding to the opinions delivered in parliament upon the policy of permitting insurances on enemy's property, the affirmative of which was supported by Sir *Dudley Ryder* and Lord *Mansfield*, when Attorney and Solicitor General in 1747.

consideration

consideration and discussion which the point now immediately before this Court, and the authorities and principles connected with it, then received from Lord *Alvanley*, render it unnecessary for me to go more at large into the same subject upon the present occasion. I will, however, before I conclude, take notice of one point which was made in argument in a case similar to the present, and in which I am next about to pronounce the judgment of the Court; I mean the case of *Gamba* v. *Le Mesurier;* and that point was this: that the Legislature, by the provisions contained in the stat. 34 *Geo.* 3. *c.* 79. *s.* 17, viz. "that it should be lawful for any person or persons, who "before the 8th of *May* 1793 had effected any insurance in "their own names on any ship or effects belonging to persons "resident in the dominions of *France*, or within any territory "or place which was on the 1st of *January* 1791 subject "thereto, or which during the war should be under the govern- "ment of *France*, *for the benefit of such persons* so residing "respectively," to apply to the commissioners appointed by that act to direct the payment of any money due by virtue of such insurance, in such manner as the commissioners should direct, and which the commissioners were authorized to order accordingly; and that in case of refusal to pay such money, it should be lawful for the persons in whose names such insurance might have been effected, *with the leave of the commissioners, to bring any action on such insurance*, and to recover [405] any money due thereon, any thing in the said recited act of this present session of parliament (i. e. 34 *Geo.* 3. *c.* 9.) to the contrary notwithstanding: and that it should not be pleaded to any such action, that the person or persons, for whose benefit any such insurance was made, was an *alien enemy:* provided that the money which should be recovered by means of any such action should in all respects be subject to the provisions contained in the said recited act, and that act. It was contended, that the act in question contemplated actions for insurances effected by *British* subjects, in trust for residents in *France* even during the war, (for the period mentioned in that act as the allowed limit to such insurances, viz. the 8th *May* 1793, was near two months after the commencement of the war), as generally maintainable, except for the objections which that act removed, out of the way, viz. the objection arising out of the prohibition contained in the 5th sect. of the 34 *Geo.* 3. *c.* 9. of paying money belonging to persons in *France:* and also the

1803.

KELLNER *against* LE MESURIER.

objection arising out of a provision in the 7th section, which prevented the maintenance of any action contrary to the provisions of that act; and also, the further objection which might be made by plea, (and which was in fact made in the then depending action of *Brandon* and *Nesbit*,) viz. that the person alleged to be interested, and for whose benefit the action was brought, was an alien enemy: in other words, that by removing the recent statutable impediments to the *suit*, and the common law objection to the *person* of him whose suit it in effect was, and those only, the Legislature must have considered no other objection as actually standing in the way of the plaintiff's right to recover. And certain it is, that the objection now relied upon, viz. to the general nature of the suit as founded
[406] upon a contract which the law will not assist in carrying into effect, was not removed by the provisions of that act; unless the provision, that it should not be pleaded to any such action, that the person for whose benefit such insurance was made was an alien enemy, could be construed, (which in furtherance of the intention and object of the Legislature on this head it perhaps might have been,) as going the length of providing, that the hostile situation of the party interested, and any contravention of law by the insurances in question arising out of that circumstance, should not have the effect of barring the plaintiff's right to recover thereupon. If however these words cannot receive a construction in this extent, the consequence certainly is, that the Legislature in the instance in question defectively provided for the right of suit it meant to give, by not removing *all* the impediments which then stood in its way; a construction certainly more just in point of law, and more true in point of fact, as applied to the actual intentions of the Legislature upon the subject, than that construction is, by which the Legislature is to be supposed to have altered the law in a matter whichso extensively affects the interests of the country, as the allowing its subjects to indemnify its enemies from loss arising from capture by its cruizers, and to have declared indirectly that insurances made for the protection of enemies' property should be a valid subject of action in a court of law. We are of opinion therefore that this last objection also is unfounded, and that there ought to be judgment for the defendant.

Judgment for the Defendant.

1803.

GAMBA and Another *against* LE MESURIER.

Monday, Nov. 28th.

An underwriter on *French* property in time of peace is not liable for a loss occasioned by capture by the King's ships during hostilities which commenced between *Great Britain* and *France* subsequent to the policy being effected and terminated prior to the action brought.

THIS was an action upon a policy of assurance, dated 18th of *September* 1792, upon the goods on board the ship *Æole* at and from *St. Domingo* to *Dunkirk*, to recover a loss by capture. At the trial before Lord *Ellenborough* C. J. at the sittings in *London* after *Hilary* Term 1803, the jury found a verdict for the plaintiffs subject to the opinion of this Court upon the following case.

The plaintiffs on the 18th of *September* 1792 caused the insurance in question to be made on the ship *Æole*, and on any kind of goods and merchandizes on board. The defendant subscribed the policy for 200*l.* on the goods. On the 16th of *October* 1792 the ship begun to take her loading on board. From the time of the insurance until the loss hereinafter-mentioned the plaintiffs were owners of the ship, and interested in the cargo beyond the amount of the sum insured. At the time the policy was effected, and from thence until the action was commenced, the plaintiffs were *French* subjects, merchants and partners, resident at *Dunkirk* in *France*, which country, *when the policy was effected*, was *in amity* with this kingdom, and remained so until *February* 1793, at which time *hostilities broke out* between this kingdom and *France*. The ship *Æole* with her cargo on board remained in good safety at *St. Domingo* until the 29th of *September* 1793, when the ship and her cargo were captured by three *British* frigates, and were afterwards regularly condemned in the Court of Admiralty as *prize* to the *British* force. At the time this action was commenced this country was again in amity with *France*. On [408] the 3d of *May* 1795, his Majesty granted a licence to Messrs. *Bourdieu*, authorising them to receive from the underwriters on this policy the money for which they had subscribed; and this action was brought under the directions of Messrs. *Bourdieu*, the plaintiffs' agents. The question for the opinion of the Court was, Whether the plaintiffs were entitled to recover in this action? If the Court should be of opinion that they were, a verdict was to be entered for the plaintiffs; if not, then a nonsuit was to be entered. Either party was to be at liberty to turn this case into a special verdict.

 This

1803.

GAMBA and Another *against* LE MESURIER.

This case was argued with great ability in this term by *C. Warren* for the plaintiffs, and *Best* Serjeant for the defendant. But as the arguments were of the same general nature as those commented upon in the judgment delivered in the last case, some of which arguments were particularly noticed by the Lord Chief Justice as having been urged by the counsel for the plaintiffs in this case, the same reason which was there given for the omission of the arguments at the bar will suffice to excuse me for not repeating them here. The cases are all collected in the report of *Furtado* v. *Rogers*, 3 *Bos. & Pull.* 191.

Lord ELLENBOROUGH C. J. now delivered the opinion of the Court.

This was an action upon a policy, effected by *French subjects before the war* which broke out in 1793, upon the ship *Æole* and her cargo, which were *captured afterwards during the war*. The action was brought during the period in which amity was restored between the two countries. This action, for the reasons already given in the case of *Kellner* v. *Le Mesurier*, we are of opinion [409] is not maintainable. It was in the course of the argument in this case on the part of the plaintiff, that the point was made by Mr. *Warren*, on the construction and effect of the statutes 34 *G.* 3. *c.* 9, & 79, as recognizing the right to maintain this species of action; upon which I have observed already. The other grounds upon which he principally rested his arguments for the defendant have not induced us to alter the opinion we formed on the hearing of the former case; for it by no means follows that an action can be maintained on a contract detrimental to the interests of the state, because, until a particular statute was made to prohibit ransom bills, actions were in fact maintained on such bills; for, as was observed at the bar, at the time when such contracts were allowed to be sued upon, it was supposed that the interests of the country were rather advanced than prejudiced by them. And as to the argument, built upon the supposed case of a contract made *before* a war to supply an alien with a certain number of ships or certain quantities of goods *after* a war, it does not appear to us to have any bearing on the question; for such contract would not have any tendency to assist the enemy by indemnifying him against the reprisals of this country, unless the supply of ships or goods were to depend on the losses which he might happen to sustain during the war: in which case the same objection would hold as that which prevents an insurance during the war; for it differs

only

only in degree whether an enemy be indemnified during a war for the losses he sustains in consequence of it, or whether he receive a compensation for those same losses after the determination of the war; in both cases the loss will at one time or another fall on the country of which the insurer is a subject, and the enemy will during the war receive either *means or encouragement* from his losses being in the one case compensated as they shall happen, and in the other, from his prospect of indemnity at last.

GAMBA and Another *against* LE MESURIER.

[410]

A nonsuit to be entered.

BRANDON *against* CURLING.

Monday, Nov. 28th.

An insurance on goods from *London* to *Bayonne* in *France*, shipped on board a neutral ship on account and at the risk of *Frenchmen before* the declaration of hostilities between *Great Britain* and *France*, but *exported* afterwards, cannot be enforced against the underwriter even after the restoration of peace, to recover a loss by capture of a co-belligerent (though not stated to be an *ally*) during the war. Every insurance on alien property by a *British* subject must be understood with this implied exception, that it shall not extend to cover *any* loss happening *during the existence of hostilities* between the respective countries of the assured and assurer.

THIS action was brought against the defendant as an underwriter on a policy of insurance on goods in the ship *Greyhound*, warranted an *American* ship, on a voyage at and from *London* to *Bayonne*; and the loss was stated to have arisen by seisure and detention. At the trial before Lord *Ellenborough*, at the sittings after *Hilary* term 1803, a verdict was found for the plaintiff for 194*l.* 15*s.*, subject to the opinion of the Court on the following case.

The plaintiff, being a merchant residing in *London*, in the latter end of the year 1792 received orders from the persons averred to be interested in the goods insured, resident at *Bayonne* in *France*, to purchase and ship for their account, on commission, sundry *East India* piece goods, which he accordingly purchased for them. These goods were shipped by the plaintiff on board the ship in question, (being a general ship) in the port of *London* in *January* 1793; and on the 4th of *February* 1793 the bills of lading were signed by the captain, and on the following day were forwarded by the plaintiff to the consignees of the goods at *Bayonne*, for whom the same had been purchased and shipped, accompanied by invoices thereof. On the 4th of *February* 1793 an order of council of that date was signed, and on

1803.

BRANDON *against* CURLING.

on the 9th was published in the Gazette, which, after reciting "that his Majesty had received intelligence that some ships belonging to his subjects were detained in the *French* ports, ordered that no ships belonging to any of his Majesty's subjects should be permitted to enter and clear out for any of the ports of *France*, or for the ports of any country occupied by the armies of *France*, until further orders; and that a general embargo or stop be made of all *French* ships then within, or which hereafter should come into any of the ports of *Great Britain*, together with all persons and effects on board the said ships; but that the utmost care be taken for the preservation of the cargoes on board any of the said ships, so that no damage or embezzlement whatsoever be sustained." The policy was subscribed by the defendant on the 21st of *January* 1793. On the 11th of *February* 1793 the said ship sailed from *London* for *Bayonne:* the captain having first done at *London* every thing necessary by law and the practice of the custom-house to enable her to sail from *London*, with an intention of going to *Bayonne*. On the 13th of *February* 1793 she arrived at *Gravesend*, and on the following day the captain received from the searchers' office there, according to the ordinary and usual course, the cocquet and other papers, which are always transmitted from the custom-house in *London* to *Gravesend*, for the purpose of being there delivered to the captains of ships sailing upon outward voyages, and the ship immediately afterwards sailed from *Gravesend* for *Bayonne*. The order of council for the declaration of hostilities between *Great Britain* and *France* was signed by his Majesty's privy council on the 11th February 1793, and on the following day was received by the commissioners at the custom-house in *London*. The order of council declaring hos- [412] tilities against *France* was published in the *London* Gazette on the 12th of *February*. In the latter end of *February* the captain was under the necessity of putting into *Port Passage* in *Spain*, and before he could prosecute his voyage to *Bayonne*, the cargo was seized by officers acting under the authority of the king of *Spain*, and afterwards condemned as prize. The ship was *American*, as warranted; and the persons interested in the cargo were *French* subjects resident at *Bayonne* at the time the goods were ordered, purchased, and shipped, and also at the time the ship sailed on the voyage, and at the time of the capture. The question for the opinion of the Court was, Whether the plaintiff were entitled to recover in this action? if the Court should

should be of opinion that the plaintiff was entitled to recover, the verdict to stand: if not, then a nonsuit to be entered. 1803.

BRANDON *against* CURLING.

The case was argued on a former day in this term, when many of the arguments adduced in the two last cases were again urged. But it will be sufficient to advert to the principal grounds upon which this case was attempted to be distinguished from those.

Giles, for the plaintiff, first referred to the dates of the case, to shew that the contract was legal at the time it was made, the policy having attached in *January* 1793, at which time the property of the goods was vested by the shipment in the assured, by whose order and at whose risk they were shipped; and the embargo not taking place till the 9th of *February*, nor hostilities declared till the 12th: And then contended that the Court of *C. B.* in *Furtado* v. *Rogers* (a), did not proceed upon the ground that the contract of insurance which was valid in its [413] inception, (having been made like the present in the time of peace), was vacated by the commencement of hostilities between the countries of the assured and insurer; but that the contract itself must be so expounded as to exclude the particular occasion of the loss in that case, which was by *British* capture; it not being competent to any subject to enter into a contract to indemnify another against the acts of his own state: and therefore, says Lord *Alvanley*, in delivering the judgment of the Court in that case, "the law infers that the contract contains an exception of captures made by the government of his own country." [Lord *Ellenborough* C. J. Is it not as much an implied exception in the contract to exclude captures by the ally of the *British* government?] That question cannot be raised in this case, because the fact of *Spain* being then an *ally* of *Great Britain* is not stated. The question then is resolvable into this, whether, supposing the contract were legal at the time it was made, a loss happening by a peril of the sea, or any other than by a hostile act of our own state, or even of its ally, be not recoverable in time of peace, when the plea of alien enemy cannot be interposed to stay the action, nor any objection be raised on account of trading with an enemy? Now the very form of the plea of alien enemy, which was resorted to in the former action of *Brandon* v. *Nesbitt* (b) upon the same policy, shews that war of itself does not vacate an antecedent

(a) 3 *Bos. & Pull.* 191. (b) 6 *Term Rep.* 23.

1803.

BRANDON *against* CURLING.

contract made with an alien enemy before the breach with his country, *because it is only in stay of the remedy and not in bar of the contract. At most, the declaration of war only subjected the goods of the enemy to seizure; and had they been seized by the King's authority, the underwriters would not have been [*414] liable, because such a seizure is not a peril within the policy. But the plaintiff was not under any imperative obligation to seize them, without a special authority, even if he had the opportunity of doing so. Neither could he have stopped them in transitu without the assent of the *American* captain, who before the declaration of hostilities had signed the bills of lading which bound him to deliver to the consignees in *France*. Nor can this be deemed to be a policy to cover a trading with the enemy, so as to bring the case within the principle of *Potts* v. *Bell* (*a*); for the property in the goods vested in the consignees upon the shipment (*b*), which was before the war: and it does not militate against public policy for a subject during hostilities to obtain payment from an alien enemy of a debt antecedently due.

R. Carr, contrà, relied principally on the ground that though the shipment were made before hostilities declared, the goods were *exported* afterwards; which constituted either a trading with the enemy: which being illegal the insurance to cover it must also be illegal within the case of *Potts* v. *Bell* (*a*); or it was a direct insurance of enemy's goods, which was equally illegal. It matters not whether the contract be illegal ab incipio, or become so afterwards by the act of the state: in neither case can it be enforced. After the [415] declaration of hostilities, it was the duty of the plaintiff to have done every thing in his power to seize the goods or stop the sailing of the ship; he ought at least to have done every thing in his power to seize the goods or stop the sailing of the ship; he ought at least to have given notice to the government. He had an opportunity of doing so from the 11th to the 14th before the ship left *Gravesend*, during which time she was not cleared nor documented. And he cited the cases of the *Eenigheid* in *March* 1795, before the Privy Council, that of the *Fortuna* in *June* 1795, and that of the *Freeden* in *February*

(*a*) 8 *Term Rep.* 548.

(*b*) Vide *Coxe* v. *Harden*, *ante* 211.

the

1803.

BRANDON *against* CURLING.

the same year, referred to in the case of the *Hoop* (a), where, though the *shipments* were legal, the *exportation* being after notice of hostilities commenced was deemed illegal. And said that this being enemy's property at the time of the ship's sailing, the case fell directly within that of *Bristow* v. *Towers* (b). And he referred to an opinion delivered by *Valin* (c), to shew the impolicy and incongruity of insuring enemy's property.

Giles, in reply, said that the cases hitherto had only established that a subject could not *make* a contract with an alien enemy, but not that he might not *execute* one made with him before he became such. That the question as to the period of *exportation* had no connexion with the commencement of the risk on the policy, which attached from the loading of the goods on board at *London*; and the act of the ship leaving *Gravesend* was one in which the plaintiff had no concern. The *clearance* was at the custom-house in *London*, though the documents, which were the *evidence* only of that clearance, were not sent till the ship arrived at *Gravesend*. That the cases [416] cited from the Admiralty Reports, were where the goods seized were claimed by the *British* merchants who shipped them, as *their* property; and the ground of condemnation by the prize court was, that they had not done all in their power to resume possession of the property again after the consignees were known to be enemies.

Lord ELLENBOROUGH C. J. at the close of the argument said, that as this case seems to range itself within the same principle as the antecedent ones which were then under consideration, the Court would dispose of them all at the same time.

Lord ELLENBOROUGH C. J. now delivered the opinion of the Court. This is the case of a policy of assurance on goods, purchased on account of certain *Frenchmen*, and *shipped* for their benefit on board the *Greyhound*, an *American* ship, before, and actually *exported after* the declaration of hostilities between the countries of *Great Britain* and *France*, in *Febru-*

(a) 1 *Rob. Adm. Rep.* 210, 212, 213. (b) 6 *Term Rep.* 35.
(c) *Valin. on Insur. Ordin.* 3d part, 32.

ary

1803.

BRANDON *against* CURLING.

ary 1793: and the question is, Whether a policy of assurance on goods, effected in the usual terms by the plaintiff, a *British* subject, under orders from the *French subjects*, who are averred to be interested therein, and underwritten by the defendant, a *British subject*, be an insurance valid and effectual in point of law for the purpose of covering such goods in the course of their exportation and transit from *Great Britain* to *Bayonne* in *France*, in the event which has taken place of a war between the two countries? And, having, in the judgments recently given by us in the cases of *Kellner* v. *Le Mesurier*, and *Gamba* v. *Le Mesurier*, declared our opinion, that [417] the general terms of insurance against *capture* are to be understood *as virtually containing an exception of such captures as might eventually be made by His Majesty and his subjects*, and against which a *British* subject could not consistently with his public duty insure in direct terms, it follows as a consequence of the same principle, that wherever the generality of the terms of assurance might in their actual application to the covering of any particular risk produce, if effect were given to them in their extended sense, a similar contravention of public interest, the insurance must be construed in such a manner as to exclude the particular event or peril which could not, for the reason above mentioned, be so made the subject of a legal insurance in direct terms by a *British* underwriter. So that where the insurance is upon goods *generally*, a proviso to this effect shall in all cases be considered as engrafted therein, viz. "*Provided that this insurance shall not extend* "*to cover any loss happening during the existence of hos-* "*tilities between the respective countries of the assured and* "*assurer.*" Because during the existence of such hostilities the subjects of the one country cannot allowably lend their assistance to protect by insurance the property and commerce of the subjects of the other. And in like manner, and upon similar principles of public policy, the risk of *detention of princes*, *&c.* must be understood to be restrained and qualified by an implied proviso, "*that it shall not extend to cover any* "*loss happening in the course of any contraband adventure,* "*in which the goods would become liable to seizure as for-* "*feited by the laws of the country.*" More instances might be put of similar implied exceptions which may arise out of the [418] general terms of this contract, but these are sufficient for the present purpose. Inasmuch therefore as the loss now in ques-

tion

tion comes within the immediate scope and terms of that provision which we consider as necessarily to be implied, in respect to the eventual existence of hostilities between the respective countries of the assured and the assurer, we are upon this ground of opinion that the plaintiff is not entitled to recover, but that a nonsuit should be entered.

1803.

BRANDON *against* CURLING.

The Plaintiff nonsuited.

---

*SHORT, on the Demise of GASTRELL, Widow, *against* SMITH, and Another.

Monday, Nov. 28th.

Where one devised lands to two trustees in trust for certain purposes by a will duly executed and attested, and he afterwards struck out the name of *one* of those trustees and inserted the names of two others, leaving the general purposes of the trust unaltered, tho' varying in certain particulars; and did not republish his will: held that his intent appearing to be only to revoke by the substitution of another good devise to other trustees, as such new devise could not take effect for want of the proper requisites of the statute of frauds, it should not operate as a revocation; or at most it could only operate as a revocation pro tanto, as to the trustee whose name was obliterated; leaving the devise good as to the old trustee whose name was retained.

IN ejectment for certain premises in *Gloucestershire*, tried by consent before Lord *Ellenborough* C. J. at the Sittings at *Westminster*, a verdict was, by the direction of his Lordship, found for the plaintiff, which the defendants were to be at liberty to move to set aside without costs: and on a motion so made, the Court directed the facts to be put into the form of a special case for their opinion; when they appeared to be as follows:

The lessor of the plaintiff was heir at law of *Thomas Carwardine*, who at the time of making his will as after mentioned and at his death was seized in fee of the premises in question, and of which the defendants at the time of bringing the action were tenants in possession. On the 27th of *August* 1795 *Thomas Carwardine* duly made and published his will, executed and attested so as to pass real estates, by which will the premises in question were expressed to be given to *John Spillman* and *Edward Aldridge*. So much of the will as is printed in the common Roman letter is a copy of it in its original state as so published and attested. The testator afterwards made several alterations in the will, and among others struck out the name of *John Spillman*, and introduced the names of *James Wood* and *John Adey*, and did not afterwards republish his will. The parts which were struck out by the devisor are printed within crot-

1803.

SHORT d. GASTRELL *against* SMITH.

chets in the old black letter; the words added by him are in italics. After directing the payment of his debts and funeral expences, the devisor proceeded thus; "I do hereby give, devise, and * bequeath all my real and personal estates and effects of what nature and kind soever and wheresoever which I shall be possessed of, interested in, or entitled unto or in reversion at the time of my death, to [John Spillman, Gent.] *James Wood, Esq. Banker*, of the city of Gloucester, and Edward Aldridge of Bisley in the county of Gloucester, Brewer; *and Mr. John Adey of the city of Gloucester, Pinmaker*, or their heirs or assigns, whom I nominate, constitute, and appoint my executors of this my last will and testament upon trust as follows; my will and desire is, my sister Sarah Gastrill shall have only one shilling for her unnatural and illiberal behaviour towards me. I give and bequeath to my housekeeper Betty Tombs the house I now live in (the pew in the church to go with the house) for the term of years which are to come, and full power to renew in her own name with the dean and chapter of Gloucester. I also give her all fixtures, standards, together with all my household goods and chattels, viz. all my linen, plate, &c. &c. (except my tankard, &c.) I also give and bequeath her for her faithful services 200*l*. of principal money on Mr. Jefferies' estate at Minsterworth, and 10*l*. to buy her mourning. I will and order my executors before mentioned, or their heirs or assigns on the trust aforesaid, to sell all my estate at Sandhurst, both freehold and leasehold, for the most money they can get, as soon as they can conveniently after my decease; after all expence attending the sale be paid, the money arising from such sale to be distributed in six shares among my first cousins, &c. (no alteration was made in any of these bequests). I also give and bequeath all my estate, house, and lands, lying and being in the hamlets of St. Michael and St. Mary near the city but in the county of Gloucester, to the lawful children of my executor and first cousin Mr. Aldridge of Bisley in the said county, (both freehold and leasehold) their heirs and assigns for ever, when they attain the age of 21 years; subject nevertheless to the following conditions; to *be* paid out of the abovementioned premises. I further give and bequeath to my housekeeper Betty Tombs an annuity of [Ten Pounds] *Twenty Pounds per year*, payable half yearly out of the last mentioned estate for her natural life. I give and bequeath to the churchwardens of the parish of St. Michaels (for the

*[420]

[421]

the time being) the interest of 50*l.* issuable and payable out of the freehold lands before mentioned for ever, to be given to ten poor widows or householders *of good report* not receiving alms *yearly* on the twenty-*first* day of March, and every succeeding twenty-first day of March for ever. Poor residing in Barton Street five shillings each, part in the city and part in the hamlet. I give and bequeath out of my rents and cash in hand twenty pounds to the governor of the Gloucester Infirmary towards that charitable institution. And I give and bequeath to Elizabeth Tarling, niece to my housekeeper Betty Tombs, five guineas, to be paid at my decease, *and a moiety or half part of two hundred pounds I left her aunt on the other sheet.* I appoint my executor and trustee Mr. Aldridge my residuary legatee. My further will is, that my executor [Mr. Spillman] *James Wood, Esq. and Mr. John Adey, Pin-maker,* shall take *ten* pounds *each* of lawful monies to [his] *their* own use, as some acknowledgement for [his] *their* trouble. My desire is, my executor Mr. Aldridge to take to his own use my tankard, *my* watch, and two sets of silver shoe and knee buckles, immediately after my interment, with my wearing apparel, to be given to my first cousins George and Richard Hill. Lastly, I do hereby revoke all former and other wills by me at any [422 time heretofore made, and do declare this my last will and testament. In witness I the said Thomas Carwardine have hereunto set my hand and seal this 27th day of August 1795." (The signature and seal of the devisor and the attestation of the witnesses were in the usual form.)

1803.

SHORT d. GASTRELL *against* SMITH.

The testator on the 21st of *October* 1798 wrote a codicil at the bottom of his will, of which the following is a copy: "Item, if it should so happen that my first cousin Mr. Thomas Drake survive me, I desire he may be paid five guineas to buy mourning. T. C. The additional annuity [*making twenty pounds*] to Betty Tombs; and the interlining, appointing the moiety or half part of 200*l.* to Elizabeth Tarling (mentioned in the former part of this will) was done 21st *October* 1798, by me, Thomas Carwardine, testator." On the 23d of *July* 1799, the testator wrote another codicil or memorandum at the bottom of his will as follows: "With Mr. Ed. Aldridge, as a codicil hereto for appointing James Wood, Esq. Banker, and Mr. John Adey, Pin-maker, my executors to this my will in trust, with the erasures, was done this 23d day of July 1799, by me, Thomas Carwardine, testator." The question for the opinion

of

1803.

SHORT d. GASTRELL *against* SMITH.

of the court was, Whether the said *Thomas Carwardine* died intestate as to these premises (*a*)? If the Court should be of opinion that he did, the verdict was to stand; but if the Court should be of opinion that these premises passed by the will, then a nonsuit was to be entered.

Abbott for the plaintiff. By the alterations made in the will it was altogether cancelled and destroyed; and this being the
[423] case of a trust can make no alteration in a court of law, however a court of equity may consider the heir at law as a trustee for the purpose expressed in the will. It is clear that the three trustees named in the will, as it now stands, cannot take, because it was never republished after the insertion of the names of two of them. Then either both the originally named trustees must take, or the one [*E. Aldridge*] whose name was not obliterated, or the heir at law. Now it was clearly not the intention of the devisor that *John Spillman*, one of the two first named, should take, because he has expressly obliterated the devise as to him by striking out his name, which is a revocation within the words of the statute of frauds (*b*). So it is equally plain that the devisor did not intend that *Ed. Aldridge* should take *alone*, because at the very time of striking out *Spillman*'s name he added others as co-trustees with him. Then, the intent of the devisor being left uncertain, the heir at law must take. Since the statute of frauds "a devise" in writing of lands properly executed and attested may be revoked or altered no otherwise than by some other will or writing executed and attested in the same manner, or "by burning, cancelling, tearing, or *obliterating* the same by the testator himself, or in his presence and by his directions and consent." Here by the obliteration in fact of the name of one of the joint trustees and devisees of the estate of the whole devise was in effect obliterated. The word in the statute is *devise*, and not *will*: therefore a *devise* contained in the will may be obliterated, and yet the rest of the will stand good. But the *devise* of the estate in trust being one and entire, if the name of one of the devisees be obliterated, the whole devise is gone, because the devise to the one remaining trustee is a different devise from the joint devise
[424] which was before made, and which was properly executed and attested; and the effect of such obliteration therefore is to raise a new estate in that one, which can only be done by a proper

(*a*) The premises were admitted to be those devised to the trustees.
(*b*) 29 *Car.* 2. *c.* 3. *s.* 6.

republication

1803.

SHORT d. GASTRELL *against* SMITH.

republication. It may be said of *obliteration* what was formerly said of *cancelling*, that it is an equivocal act, and that in order to make it an obliteration it must be shown *quo animo* it was obliterated. This was said by Lord *Mansfield* in *Burtonshaw* v. *Gilbert* (*a*), speaking of *Onions* v. *Tyrer* (*b*), in respect of *cancelling*; and he puts instances, as if a man were to throw the ink upon his will instead of the sand, though it might be a complete defacing of the instrument, it would be no cancelling; so if having directed one or two wills to be cancelled, the person by mistake should cancel the wrong one: so if the testator himself unintentionally threw his will into the fire instead of another paper. But all these, it is to be observed, are instances of accidental mistakes in matters of *fact*; whereas the revocation here is a conclusion of law from the legal effect of obliterating the name of one of the devisees in trust. Lord *Mansfield* afterwards proceeds to say, that the whole question in *Onions* v. *Tyrer*, turned upon the act of cancelling being under a *mistake*; and the reason given by his Lordship for supposing that it was so is, because the devisees in the second will were precisely the same as those in the first, *and to the same person*. It appears, however, from other reports (*c*), that one of the devisees in trust had been changed by the second will, which was not properly attested to pass lands, though the objects of the devise were the same in both. But Lord Chancellor *Cowper* [425] decided it as a question of *revocation* and not of *cancelling*; having no doubt but that a devise of the same lands to different trustees would have been a sufficient revocation in law of the former will; though not sufficient there, for want of the subscribing witnesses attesting it in the presence (*d*) of the testator, to pass the real estate to the new trustees: but he thought there was evidence that the testator did not mean to revoke his first will but by substituting a second operative will in lieu of it. If, however, a devisor intend to revoke a will then made, and to make another; though he die before he make the other, yet

(*a*) *Cowp.* 52.

(*b*) 2 *Vern.* 743.; but he referred to 1 *P. Wms.* 343., and *note* (1) in page 344. Mr. *Coxe's* edition, as the best report of the case.

(*c*) 1 *Eq. Cas. Abr.* 407. and *P. Wms.*

(*d*) This depends on the different wording of the 5th and 6th clauses of the statute of frauds, 29 *Car.* 2. *c.* 3. the first of which only requires the attestation and subscription of three witnesses to be *in the presence of the devisor.*

 the

1803.

SHORT d. GASTRELL against SMITH.

the revocation of the former is good. As in *Brook* v. *Warde* (a), before the statute of frauds, when revocations might be by parol where one declared his will revoked by parol in a particular point, and that he would alter his written will in that respect when he came to town, &c., and before he got to town he was murdered; yet it was holden a sufficient revocation. So a devise by a subsequent will of the same lands to an incapacitated person is good as a revocation of the former devise, though the substituted devisee cannot take. Still it might be said, that the devisor mistakenly supposed that the alteration was valid in law to carry the estate to the two new and the third old trustee: but the case affords rather a contrary presumption; because the first will was attested by three witnesses, which shews that the devisor knew such attestation to be necessary to convey real estate. It is therefore more probable [426] that he afterwards intended to republish his will in the presence of three witnesses: but not having done so, the first will cannot be set up again in consequence of such omission.

Dauncey, contrà. The testator did not intend to revoke his first devise except by the substitution of another which he thought capable of carrying the estate. And it would be a strained presumption to conclude that he intended at a future time to republish his will in proper form, when he lived about a year afterwards without doing so (b); and at any rate, there are no facts stated to warrant such a presumption. It is plain that the testator meant to disinherit his heir, and had certainly done so at one time by an undisputed and effectual instrument: then according to *Harwood* v. *Goodright* (c), it lies upon the heir to prove that such devise has been as effectually defeated. But it is supposed that the devise has been defeated by the obliteration of one trustee, and by the insertion of two others, without any republication. First then as to the effect of the obliteration: admitting that part of a will may be revoked by the *obliteration* of such part by the devisor, without the same formalities as are required by the statute of frauds in the case of revocation by some other instrument, still the intention of the devisor to revoke cannot be presumed to have gone further

(a) *Dyer*, 310, *b*.
(b) The devisor died the 20th of *October* 1800. This fact, though not inserted in the case, was not disputed.
(c) *Cowp* 87. 92.

. than

1803.

SHORT d. GASTRELL *against* SMITH.

than his own act went. And where that which is left after the obliteration is perfectly sensible and complete as far as it goes, it cannot be concluded that the devisor did not mean that it should take effect. The obliteration then of the name of one of two trustees can *in itself only denote an intention to let the remaining trustee act alone, but not to cancel the devise altogether. As in *Sutton* v. *Sutton* (a), where lands were devised to *[427] trustees to sell for certain purposes; though some of the purposes were afterwards altered without republication, yet the devise to the trustees was holden to stand. Even a direct act of cancelling will not revoke if not done animo revocandi, as is said in *Burtonshaw* v. *Gilbert* (b); as where one threw ink over his will instead of sand, &c. Still less then can it be collected that the devisor meant to revoke the devise to the one trustee whose name he left when he struck out the name of the other. And in *Larkins* v. *Larkins* (c), and *Humphries* v. *Taylor* (d), it was expressly ruled to be a revocation pro tanto, as to the trustee whose name was obliterated. But, 2dly, It is said that by inserting the names of two other trustees, however ineffectual as a devise to them of the real estate for want of a re-execution and proper attestation of the will, it shews an intention that the former trustees should not take alone, and so the obliteration of the one trustee, and the addition of the two others, operates as a revocation of the devise to the remaining old trustee. But it is an established principle, that that which was intended to operate as a devise, if it cannot take effect as such, shall never operate as a revocation: *Eccleston* v. *Petty* (e), is express to this purpose. Admitting that the devisor in fact meant that the two new trustees should take the legal estate with the remaining old one, and thought that it was sufficient for this purpose to interline their names in the will; yet if he were mistaken in the effect of what he was doing, it can [428] no more work a revocation of the good devise to the former trustee, than if he had thrown ink instead of sand over his will, or the like. Even if he had added the two new trustees by a well executed codicil (f), it would not have had the effect of

(a) *Cowp.* 812. (b) *Ib.* 52. (c) 3 *Bos. & Pull.* 16.

(d) In Chan. *Hil.* 25 *Geo.* 2. 7 *Bac. Abr.* 363. edit. by *Gwillim.*

(e) *Carth.* 80.

(f) Vide 3 *Com. Dig.* 10, 11. *Devise*, F. 2. cites *Yelv.* 210. *Dy.* 4. *a.* in marg., and *Eq. Cas.* 68. 77.

revoking

1803.

SHORT d. GASTRELL *against* SMITH.

revoking the devise to the former trustee, whose name was left standing in the will. Still less could an ill executed codicil have had such an effect. And where the supposed revocation is by a written instrument, it cannot make any difference whether the writing be upon the same will, or upon another piece of paper; in either case it must be properly executed and attested by the express enactment of the statute of frauds, in order to work a revocation. And he cited *Willet* v. *Sandford* (*a*), *Acherley* v. *Vernon* (*b*) and *Onions* v. *Tyrer*; upon which last he particularly relied.

Abbott in reply observed, that the insertion of the two new trustees in the room of the one whose name was obliterated distinguished this materially from the case of *Larkins* v. *Larkins*, and *Humphries* v. *Taylor*; because it manifested the devisor's intent that the remaining old trustee should not take alone.

Cur. adv. vult.

Lord ELLENBOROUGH C. J. now delivered the opinion of the Court. It has been contended in this case, that the testator *Thomas Carwardine* has died intestate as to the premises in
[429] question, and that his heir at law is entitled to recover; inasmuch as the obliteration of the name of *John Spillman*, one of the devisees in trust, must be taken to have been done *animo revocandi*, and is a revocation of the devise made of the premises; and that it must also be taken that his intention was to have made another will accompanied with the solemnities required by the statute of frauds, or at least to have re-published the will, obliterated and altered as it is, on which the question arises. And the case in Dyer, 310. *b*. has been relied on. The facts of this case plainly shew, that the testator had no object but to change his trustees; and it would be unreasonable when he has not by any thing he has done indicated any intention to dispose of his lands to different purposes than those declared by his will: and when it clearly appears that he meant to disinherit his heir at law; to infer, that he designed that his will should become inoperative, and so to let in his heir at law by what he did, rather than to conclude, that he thought he had by the alterations introduced made a valid disposition of his

(*a*) 1 *Ves*. 178. 186. (*b*) 9 *Mod*. 68. 3 *Bro. P. C* 107.

estate

3

estate to the new trustees, and that he had no design to alter his will, except so far as such obliteration and interlineation could effectuate that purpose, by substituting the persons whose names he interlined in the stead of him whose name was struck out. If such be the case, and so it appears to us, the testator meant no revocation but by means of that, which he through mistake supposed to be a valid disposition to others, and had no intention to revoke by the obliteration he has made, but by an effectual substitution meant to be made of others in the room of him whose name was so obliterated; and if so, this case must be governed by that of *Onions* v. *Tyrer* 1 *P. Wms.* 343, where the intention of the testator not being "to revoke "his first will by cancelling, but by substituting another "perfect will in lieu thereof;" Lord Chancellor *Cowper*, on the same ground set up a like devise, and held a cancellation of the first will to be no revocation. But in this case it has been further argued for the defendants, that supposing the obliteration of the name of *Spillman* to have revoked the devise to him, the heir at law cannot recover; inasmuch as the devise to *Aldridge* remained unrevoked; and we think there is great weight in this argument: and that there are grounds on which it may be contended that the effect of the obliteration in this case is at most to revoke only the devise as to *Spillman*, the one devisee in trust whose name is so obliterated, leaving it unrevoked as to *Aldridge*: the interlineations which were intended to add other trustees, being for want of a proper publication inoperative, and therefore, giving its full effect to that obliteration, it would leave the devise to *Aldridge* in full force, and competent to sustain all the trusts of the will in exclusion of the heir at law.

1803. — SHORT d. GASTRELL *against* SMITH.

[430]

A Nonsuit was entered.

*BARROW *against* MASHITER.

Monday, Nov. 28th.

THIS was a rule to shew cause why the judgment and execution thereon should not be set aside, &c. Judgment was entered upon a warrant of attorney for that purpose *under seal*, dated 2d of *May*, 1799, in which was contained an authority to the attorney to whom it was directed to execute a *release* in

A *warrant* of attorney to confess judgment, being liable as a deed to a stamp duty of 10*s*. by various statutes prior to the 37 *G*. 3. *c*. 111. which imposes an additional duty of 10*s*. on all deeds, with an exception of bonds and *letters* of attorney, is within such exception, and therefore liable only to a duty of 10*s*. as before that statute.

1803.

BARROW *against* MASHITER.

law to the plaintiff of all errors, writs of error, &c. touching the said judgment. The warrant of attorney was upon a 10*s*. *stamp*; and the objection was, that having such a power of *releasing* contained in it, it operated as a release of errors, and was therefore to be considered as a *deed*, and should have had a deed stamp of 20*s*.

Marryat shewed cause, and relied on the stat. 37 *Geo.* 3. *c.* 111. which, imposing an additional duty of 10*s*. on all deeds, expressly excepts any bond or *letter* of attorney; which shews that, though under seal, they were meant to be distinguished from deeds in general; and said that the only doubt had arisen from the circumstance of the warrant's containing the authority to release errors upon which it was said that the opinions of certain law officers had been taken, advising that such warrants of attorney containing a *release* of errors were liable to the further duty of 10*s*. as a deed. But a bare authority to release is no release: and he referred to an act of the last sessions, imposing a duty of 15*s*. upon warrants of attorney, which has been since used.

[432] *Gibbs* and *Manley*, in support of the rule contended that the clause in question in the warrant of attorney operated as a release of errors; and if so, it was subject to the additional duty of 10*s*. at the time that the proviso referred to in the stat. 37 *Geo.* 3. *c.* 111. *s.* 2. shewed the distinction between *warrants* of attorney, which were under seal, and *letters* of attorney which need not be so: and the Legislature only meant to except such powers of attorney as contained no matter which required them to be under seal, such as a release.

The Court, however, thought that the 10*s*. stamp on the warrant of attorney was sufficient at the time it was executed, and that such instruments were excepted out of the statute 37 *Geo.* 3. *c.* 111.

Rule discharged. (*a*)

(*a*) The several acts imposing stamps on deeds in general were, in 1799, as follows:

				s.	*d.*
By 5 & 6 *W. and M. c.* 21. *s.* 3.	—	—	—	0	6
9 & 10 *W.* 3. *c.* 25. *s.* 30.	—	—	—	0	6
12 *Ann. st.* 2. *c.* 9. *s.* 1.	—	—	—	0	6
30 *Geo.* 2. *c.* 19. *s.* 1.	—	—	—	1	0
16 *Geo.* 3. *c.* 34. *s.* 5.	—	—	—	1	0
17 *Geo.* 3. *c.* 50. *s.* 16.	—	—	—	1	6
23 *Geo.* 3. *c.* 58. *s.* 1.	—	—	—	1	0
35 *Geo.* 3. *c.* 30. *s.* 1.	—	—	—	1	0
37 *Geo.* 3. *c.* 90. *s.* 1.	—	—	—	3	0
				10	6

END OF MICHAELMAS TERM.

CASES

ARGUED AND DETERMINED

IN THE

Court of KING's BENCH,

IN

Hilary Term,

1804.

In the Forty-fourth Year of the Reign of GEORGE III.

PETRE *against* CRAFT.

Tuesday, Jan. 24th.

An amendment allowed in an action for a penalty under the bribery act, by altering the venue from the county at large to an interior jurisdiction, after the time limited for commencing a new action; the particularity of the declaration making it appear probable to the Court that the plaintiff was proceeding on the same fact for which the action was originally brought, when laid by mistake in the wrong county, though there were no affidavit that it was the same.

THIS was an action for a penalty on the bribery act, 2 *Geo.* 2. *c.* 24. *f.* 7. for soliciting a reward for giving a vote for a member to serve in parliament, which charged the bribery to have been at *Heydon* in the county of *York*, where the venue was laid; and the cause was entered for trial at the last assizes at *York*, but was made a remanet, for want of time to try it. But it having been discovered soon after that the solicitation of the bribe was at *Kingston-upon-Hull*, which is a county of itself, a rule was obtained in last *Michaelmas* term calling upon the defendant to shew cause why the declaration, issue, issue roll, and nisi prius record should not be amended by altering the

1804.

PETRE *against* CRAFT.

the venue to the town and county of the town of *Kingston-upon-Hull*; upon the authority of *Steel* q. t. v. *Sowerby* (*a*), where the power of the Court to amend in penal actions was admitted, and *Cross* v. *Kaye* (*b*), and *Maddock* v. *Hammett* (*c*), where such amendments were made after the time limited for bringing other actions on the same facts, which was admitted to be the case here. And it was insisted by *Wood* and *Barrow* in support of the rule, that the amendment would leave the offence stated in substance the same as before; the only mistake being in the venue, which in point of form must be laid in the county of the town where the actual solicitation of the bribe was, and not in the county at large, where the franchise was to be exercised.

Gibbs and *Raine* in shewing cause insisted principally upon the want of any affidavit in support of the rule, in order to shew that the fact, now meant to be proved within the county of the town of *Kingston-upon-Hull*, was the same as that originally declared upon in the county at large; without which it did not appear but that the plaintiff might have originally had a cause of action against the defendant for bribery in the county at large; and having afterwards discovered another supposed better cause of action in the county of the town, after the period elapsed for bringing a new action, might adopt this mode of altering the venue in order to obviate the objection of lapse of time. That however the Court might admit of mere formal amendments in penal actions, they would not admit of one which went to give a new cause of action, such

(*a*) 6 *Term Rep.* 171. (*b*) *Ib.* 543. (*c*) 7 *Term Rep.* 55.

as

as this, which would enable the plaintiff to introduce a distinct fact in a different county.

The Court, however, thought that the offence, as laid, was of such a particular nature, that there was no danger of enabling the plaintiff by the amendment proposed to introduce any new fact in proof not originally within his contemplation, and that the mistake in the venue was reasonably accounted for: and therefore they made the rule absolute, unless the defendant signified his consent not to take any objection at the trial to the proof of the facts charged in the other county.

Rule absolute.

A few days after came on a similar rule in the case of

DOVER *against* MESTAER,

Wednesday, Feb. 8th.

Such amendment allowed, though it appeared that there were distinct causes of action in the two different counties, upon an affidavit that the plaintiff proceeded on a mistake in supposing that both causes of action could be proved in the county where the election was holden.

For amending the declaration, &c. by changing the venue from *Yorkshire* to *Kingston-upon-Hull* in an action for bribery at the same election. The rule in this case, however, was moved for on an affidavit stating, that the plaintiff, intending to sue the defendant for bribery and corruption at the last election for the borough of *Heydon*, laid the venue in *Yorkshire*, upon a mistaken supposition that all the acts of bribery and solicitation, (some of which took place within the interior jurisdiction of the county of the town of *Kingston-upon-Hull*), were proveable in *Yorkshire* where the election took place: and that he had at the time given notice of his intention to go for acts of bribery in *Hull* as well as in *Yorkshire*; but finding

 ing

1804

DOVER *against* MESTAER.

ing his mistake after the cause went down to trial, where it was made a remanet, this rule was applied for.

Gibbs and *Comyn*, in shewing cause against the rule, endeavoured to distinguish it from the foregoing case; for here it appeared upon the plaintiff's own shewing that he had distinct causes of action in *Yorkshire* and in *Kingston-upon-Hull*, of which he was apprised at the time; and as he could not include both in the same record, and had made his election to go for the penalties incurred in *Yorkshire*, he ought not to be permitted now to shift his ground, and in effect to commence another action, after the time was out for suing upon the causes of action accruing in *Kingston upon-Hull*; being bound to know that he could not give in evidence acts of bribery in another county than that in which the venue was laid. This therefore was no mistake of local boundary as in the other case.

Erskine, *Garrow*, *Wood*, and *Barrow*, in support of the rule, insisted that this case was substantially the same as the last; the plaintiff having proceeded upon a mistake in supposing that he could lay his venue in *Yorkshire* where the election was had, although the acts of bribery were within another jurisdiction. That here it was expressly sworn, that the acts of bribery committed in *Hull* were within the contemplation of the plaintiff [illegible] he brought his action; and if he had then been well advised, it would have been very easy for him to have divided the charges in two several records, which would have obviated any difficulty. That the amendment now prayed for was not like enabling the plaintiff to bring another action out of time, as the plaintiff must by such amendment

ment abandon all his cauſes of action in *Yorkſhire*, and confine himſelf to thoſe in *Hull*. And as to any new cauſes of action in *Yorkſhire* which the plaintiff was within time to bring, he would undertake not to do ſo.

1804.

DOVER *against* MESTAER.

Lord ELLENBOROUGH C. J. If it had never been determined that any amendment could be made in penal actions after the time limited for bringing a new action was out, I ſhould have doubted the propriety of allowing ſuch an amendment for the firſt time: but after the deciſions which have taken place, upon the authority of which we felt ourſelves compelled the other day, to admit of an amendment ſimilar to the one now prayed for, it is too late to ſuſtain the objection; although ſuch amendments do often, as in this inſtance of changing the venue, amount pro tanto to giving a new action after the time limited by the ſtatute. I think therefore, upon the plaintiff's offer to abandon his right to bring any new action upon thoſe cauſes of action ariſing in *Yorkſhire*, which he is yet within time to do, and which he now virtually abandons upon this record by the amendment propoſed, we cannot ſtop ſhort of the original error, if it be one, of allowing ſuch amendment.

LAWRENCE J. The line which has been drawn in the former caſes is that where there has not been any unneceſſary delay on the part of the plaintiff in the proſecution of a penal action, the Court will allow of an amendment as in other caſes, the cauſe of action being in truth the ſame.

Per Curiam. Upon the plaintiff's undertaking not to bring any new action in *Yorkſhire*,

Rule abſolute.

1804.

Thursday, Jan. 26th.

PARSLOW *against* DEARLOVE.

School-money for the education, &c. of the defendant's son, payable half-yearly, is not a *debt due* till the end of the half-year, so as to be proveable under a commission of bankrupt against the parent who became bankrupt a few days before the end of the half-year, though he had, just before his bankruptcy, taken his son home *for the holidays*; the contract not being thereby put an end to: and consequently the bankrupt's certificate under the st. 5 G. 2. c. 30. is no bar to an action against him for the half-year's education, &c. The stat. 7 G. 1. c. 31. s. 1, which enables debts payable at a future day to be proved under the commission, is confined to *written* securities.

ASSUMPSIT by the plaintiff, a schoolmaster, for the education, board and lodging of the defendant's children, to which the defendant pleaded non-assumpsit, and his bankruptcy and certificate. At the trial before Lord *Ellenborough* C. J., at the last sittings at *Westminster*, it appeared that the school-money had been paid half-yearly; that the half year, for which the plaintiff now sought to recover, ended on the 24th of *June* last, when the holidays commenced; but that the defendant had taken his children home for the holidays on the 18th of *June*, and became a bankrupt on the 20th. The question, therefore, was whether this debt were proveable under the commission? his Lordship, being of opinion that it was not, directed a verdict to be found for the plaintiff: which

Espinasse now moved to set aside; contending that the debt was *contracted before* the bankruptcy, though *payable afterwards*; and therefore proveable under the commission, and discharged by the certificate, by stat. 7 *Geo.* 1. *c.* 31. *s.* 1. and 5 *Geo.* 2. *c.* 30. It was a debt certain in its amount, and payable at a future day certain. If the contract were entire, then the debt was contracted as soon as the half year was entered upon by the children; if it were divisible, then so much, and the greater part of it, was contracted when the children went home, which was before the bankruptcy; for thereby the defendant closed the contract, and nothing further was left to be done by the plaintiff. And he cited *Cockran* v. *Love* (*a*), and *Hen-*

(*a*) *Co. Bank. L.* 18. (23).

best

1804.

PARSLOW *against* DEARLOVE.

best v. *Brown* (*a*), where Lord *Kenyon* was of opinion that the ſtatutes extended to all *debts* as well as *written ſecurities* payable at a future day.

Lord ELLENBOROUGH C. J. The report of the laſt-mentioned caſe only ſtates that ſuch was the inclination of Lord *Kenyon*'s opinion. But it does not appear that the words of the ſtatutes were particularly preſented to his judgment at the time. And whatever weight is juſtly due to the intimation of his opinion, I have no idea how the meaning of a ſtatute can be carried by conſtruction ſo far beyond the expreſs words of it. Now the ſtat. 7. *Geo.* 1. *c.* 31. enabling creditors to prove debts payable at a day after the bankruptcy under the commiſſion is confined to *written* ſecurities, and was ſo conſidered in a caſe in *Pr. Williams* (*b*). The queſtion then is whether this can be conſidered as a *debt* due at the time of the bankruptcy; in other words, whether, under a contract to pay a certain ſum half yearly, the money can be ſaid to be due before the end of the half year? This is nothing like a debitum in præſenti. It would depend upon the due performance of the engagement on the part of the ſchoolmaſter. It was a ſubſiſting contract at the time of the bankruptcy: the children were not taken away from the ſchool, but went home for the holidays.

LAWRENCE J. The words of the ſtat. 7. *Geo.* 1. do not go beyond *ſecurities* of the nature therein deſcribed, which are all *written* ſecurities.

Per Curiam, Rule refuſed (*c*).

(*a*) *Peake's Ni. Pri. Caſ.* 54.

(*b*) *Ex parte of the Eaſt India Company*, 2 *P. W'ms.* 396.

(*c*) The ſtat. 7 Geo. 1. c. 31. reciting that traders in goods are often obliged to diſpoſe of their goods upon credit, "and to take bills, bonds, pro- "miſſory

1804.

PARSLOW *against* DEARLOVE.

" missory notes, or other *persons*" (a mistake for *personal*, which is rectified in st. 5 *Geo.* 2. *c.* 30, *s.* 22. per Lord *Mansfield*, in *Pattison* v. *Bankes*, *Cowp.* 543.) "*securities* for their moneys payable, &c. at future days of payment; " and the buyers of such goods becoming bankrupts, and commissions of " bankruptcy being taken out against them before the money upon *such* " *bonds, notes, or other securities* become payable, it hath been a question whe- " ther such persons giving such credit *on such securities* should be let in to " prove their debts, &c. before such time as *such securities* became pay- " able," &c.; for remedy, enacts and *declares*, that " all persons who have " given credit, or shall give credit on *such securities as aforesaid*, to any persons " who shall become bankrupts, upon good consideration, &c. for any money " or other matter or thing whatsoever which is or shall not be due or pay- " able at or before the time of such person's becoming bankrupt, shall be ad- " mitted to prove their respective bills, bonds, notes, *or other securities, pro-* " *mise, or agreements* for the same, in like manner as if *they were made* " *payable* presently, and not at a future day," &c. It then entitles the parties to receive their dividends with a rebate of interest " to be computed " from the actual payment thereof to the time such debt, duty, or sum of " money would have become due and payable *in and by such securities as afore-* " *said.*" Then the 2d section discharges the bankrupts from " Every such " bond, note, or *other security* as aforesaid."

It seems to have been taken for granted in the following cases, that, notwithstanding the words " *promise or agreements*," which occur in one part, the statute was confined to *written securities*, though that was not the point immediately in judgment; *Swaine* v. *De Mattos*, 2 *Stra.* 1211.; *Chilton* v. *Whiffin*, 3 *Wils* 17.; *Goddard* v. *Vanderheyden*, *ib.* 271.; and *Pattison* v. *Bankes*, *Cowp.* 543.

1804.

MOUNTFORD, Adminiſtrator of HOLLAND, *againſt* GIBSON.

Saturday, Jan. 28th.

A creditor of an inteſtate, who received goods of the inteſtate after his death from his widow, in payment of the debt, cannot protect his poſſeſſion againſt an action of trover by the lawful adminiſtrator, upon the ground of ſuch delivery having been made by one who had, by ſuch intermeddling, made herſelf executrix de ſon tort; no fact appearing to give colour to her having acted in that reſpect in the character of executrix, except the ſingle act of wrong complained of, in which the defendant participated. *Qu.* How far any payment by an executor de ſon tort to a creditor can be ſet up as a bar to an action of trover by the lawful executor, &c.; though if it be ſuch as the latter would have been bound to make, it ſhall be recouped in damages.

IN trover for a quantity of iron, tried at the laſt aſſizes for *Stafford* before *Lawrence* J., the caſe was opened by the plaintiff's counſel to be that the goods in queſtion had been originally ſold by the defendant to the inteſtate in his life-time; that on his death, they not having been paid for, on application to the inteſtate's widow for that purpoſe, ſhe delivered them back to the defendant in ſatiſfaction of his demand. No other acts were ſtated to have been done by the widow to ſhew that ſhe had before taken upon herſelf to act as executrix: but on this ſtatement the defendant's counſel contended, that ſhe having, by this intermeddling with the inteſtate's effects, made herſelf executrix de ſon tort, and as the defendant's was a juſt debt, which the rightful adminiſtrator would have been bound to have paid, the defendant had a right to protect himſelf in this action under ſuch payment by the executrix de ſon tort: for which they cited the dictum in *Parker* v. *Kett* (a), that a legal act done by executor de ſon tort will bind the rightful executor. On the other hand was cited *Lockſmith* v. *Creſwel*, 2 *Rol. Abr.* 399. tit. *Relation pl.* 1. as a caſe in point. The learned judge thought the plaintiff was entitled to recover; but gave the defendant leave to move to ſet aſide the verdict and enter a nonſuit, if the Court thought his direction wrong. A rule niſi for that purpoſe was accordingly obtained in *Michaelmas* term laſt, againſt which

(a) 1 *Ld. Ray.* 661.

Williams

1804.

MOUNTFORT *against* GIBSON.

Williams Serjeant and *Wigley* were now to have shewn cause; but the Court required the counsel for the defendant to sustain their rule.

Milles and *Jervis* in support of the rule. 1st. Any act of intermeddling by a stranger with the effects of an intestate, by which he assumes a disposing power over them, will make the party an executor de son tort. *Read's* case (*a*), and *Padget* v. *Priest* (*b*). In *Dy.* 166. *b. notes*, cases are referred to where it was ruled that even taking a dog, or milking a cow of the intestate, will make an executor de son tort. Then the act of the intestate's widow, in delivering the goods to the defendant in payment of his demand, was sufficient to constitute her executrix de son tort. 2dly. A payment of a just debt to a creditor of the intestate, in the due course of administration, by one who was executrix de son tort will be good against the lawful administrator, and cannot be recovered back by him. It shall, as Lord *Holt* says in *Parker* v. *Kett* (*c*), "alter the property against the lawful executor." It is true, he goes on to observe, that the executor de son tort shall not be quit against the rightful executor, but the latter may maintain trover against him; but if he have rightfully administered to the whole extent of the goods come to his hands, the damages shall be abated so much, and the rightful executor shall only recover nominal damages. But Lord *Holt* no where intimates that such an action would lie even for nominal damages against the just creditor, who had received the intestate's money in payment from the wrongful executor. For as to him,

(*a*) 5 *Rep.* 33. *a.*

(*b*) 2 *Term Rep.* 97. See also *Edwards* v. *Harben*, *ib.* 587—597.

(*c*) 12 *Mod.* 471.

he ſays, "the meddling with the goods is that which gives the creditor notice who is executor and bound to pay the debts; and the creditor is not bound to inquire into the executor's title; if there be *a colour and appearance* of it, it ſuffices." Now here there was a good colour of title; for the perſon from whom the defendant received the goods was the inteſtate's widow, who was in poſſeſſion of them after his death (*a*). Lord *Holt* even goes on to ſtate, that if an executor de ſon tort pay the inteſtate's money duly to a juſt creditor, the lawful executor ſhall not even maintain trover againſt the wrongful executor, becauſe it is a good payment and no prejudice to the executor. [Lord *Ellenborough* C. J. That is directly contrary to what the ſame learned judge is reported to have ſaid in *Whitehall* v. *Squire* (*b*), where he ſays that the executor de ſon tort cannot to ſuch an action plead payment of debts to the value, or that he has given the goods in ſatiſfaction of the debts: becauſe no man ought to obtrude himſelf upon the office of another; but upon the general iſſue pleaded ſuch payments ſhall be recouped in damages.] Yet Mr. Juſtice *Buller* in his niſi prius (*c*), after laying down the ſame rule, (for which he cites *Carth.* 104, and other caſes), adds, that if the payments ſo made by the wrongful executor amount to the full value, the plaintiff ſhall be nonſuited. But he takes the diſtinction between trover and treſpaſs; that in the latter action payment of

(*a*) This was ſtated as a fact by the defendant's counſel in the courſe of the argument; as alſo that the inteſtate died in *July* 1801, and that ſhe continued in poſſeſſion till *April* 1802, when letters of adminiſtration were taken out by the plaintiff, a creditor: but nothing of this ſort appeared at the trial, where iſſue was taken upon the opening of the plaintiff's counſel upon the matter of law.

(*b*) *Carth.* 104. (*c*) Page 48.

debts

1804.

MOUNTFORD *against* GIBSON.

debts to the value will only go in mitigation of damages. And perhaps, he adds, in trover by a rightful administrator against an executor de son tort, he could not give in evidence payment of debts to the value for such goods as were still in his custody, but only for such as he had sold. And a distinction is also taken in the books, as in *Baker* v. *Berisford* (*a*), that although an executor de son tort cannot retain for his own debt, yet he may well pay others; which accords with what is said in *Coulter*'s case (*b*), where after insisting that he shall not retain for his own debt, because it is not reasonable that one should take advantage of his own wrong, Lord *Coke* adds, that "it is clear that all *lawful* acts which an executor of his own wrong doth are good." And all the books agree that he may lawfully pay the intestate's creditors in a due course of administration. And it is not suggested that there were any specialty creditors in this case who were entitled to a preference. So an executor de son tort may plead plene administravit (*c*). The case of *Whitehall* v. *Squire* (*c*), was an action by the rightful against the wrongful executor; and there two judges were of opinion against Lord *Holt* that the action was not maintainable, because the plaintiff was a particeps criminis with the defendant, and the case relied on at the trial in 2 *Rol. Abr.* 399. *pl.* 1. was trover against *a stranger*, who took and converted the goods to his own use before administration granted to the plaintiff; and held that the action well lay, because, after administration granted, the plaintiff was in by relation from the death of the intestate. But that was evidently the case of a mere wrongful act

(*a*) 1 *Sid.* 76. (*b*) 5 *Rep.* 30 *b.*

(*c*) *Whitehall* v. *Squire*, *Carth.* 104. *Skin.* 27. *Holt's Rep.* 45. *Salk.* 295. ; and 3 *Mod.* 276.

of

1804.

MOUNTFORD *against* GIBSON.

of a ſtranger, in poſſeſſing himſelf of the goods without any colour of authority: but though the act of an executor de ſon tort in poſſeſſing himſelf of the inteſtate's goods may be wrongful, yet it is not a wrongful act in him to pay the inteſtate's debts in the due courſe of adminiſtration; and therefore it can be no converſion in the creditor to receive ſuch goods in ſatisfaction of his debt.

Lord ELLENBOROUGH C. J. I am not inclined to diſpute moſt of the propoſitions which have been advanced in the argument, but the anſwer to them is, that they have no application to the only queſtion in this caſe. For when it is ſaid that all payments which are made by an executor de ſon tort in a due courſe of adminiſtration ſhall be allowed, that may be conceded; but a ſingle act of wrong in taking the goods of the inteſtate, though it may be ſufficient to make the party an executor de ſon tort with reſpect to creditors who may chuſe to ſue him in that character, yet will not give him any right to retain them as againſt the lawful adminiſtrator. And the only evidence before the Court, that the widow of the inteſtate acted in the character of executrix de ſon tort, is this ſingle act of wrong in which the defendant participated. I take the principle to have been clearly eſtabliſhed by Lord *Holt* in the caſe of *Whitehall* v. *Squire*, in *Carth.* 104. which appears to have been much conſidered. That was a caſe where the plaintiff, having received a horſe belonging to the inteſtate from the defendant in remuneration of ſervices performed at the requeſt of the defendant about the funeral of the inteſtate, afterwards adminiſtered to the inteſtate, and brought trover againſt the defendant for the value of the horſe ſo received by himſelf before he became adminiſtrator. By

1804.

MOUNTFORD *against* GIBSON.

Lord *Holt*'s opinion, the plaintiff ſhould have recovered; and he never intimated that the delivery being made by one acting as executor de ſon tort would be a bar to an action by the rightful adminiſtrator: and the other two judges who differed from him in the concluſion never queſtioned the right of the adminiſtrator to maintain ſuch an action in general; but they held that the plaintiff, being a particeps criminis in the very act he complained of, ſhould not be permitted to recover upon it againſt the perſon with whom he had colluded. But there is no intimation of a difference of opinion upon any other point of Lord *Holt*'s judgment. If this defence could be maintained the whole ſyſtem of adminiſtration of an inteſtate's effects would be put an end to, and inſtead thereof an authoriſed ſcramble introduced by law among the creditors for priority of payment, where the aſſets were inſufficient; and ſuch as had no chance of payment in the regular courſe of adminiſtration would by underhand means plant a beggar in the inteſtate's houſe, and under colour of his being thus made an executor de ſon tort, would obtain a delivery from him of the goods with which they had reſpectively furniſhed the inteſtate. It may be ſaid that ſuch a tranſaction might be impeached on the ground of fraud; but if a creditor could thus acquire a title to the inteſtate's property by the naked act of delivery by another, it would be very difficult in many caſes to prove that ſuch delivery had been made in colluſion with the creditor who received the goods. Without diſputing, therefore, the authority of any of the caſes which have been referred to, it is ſufficient to obſerve, that when it is laid down generally that payments made in the due courſe of adminiſtration by one who is executor de ſon tort are good, that muſt be underſtood of caſes

where

where ſuch payments were made by one who is proved to have been acting at the time in the character of executor, and not of a mere ſolitary act of wrong in the very inſtance complained of, by one taking upon himſelf to hand over the goods of the inteſtate to a creditor. If it were neceſſary, it might be fit to conſider whether in any caſe ſuch a delivery of the inteſtate's goods to a creditor, by one who had no lawful authority, would be a bar to an action of trover by the rightful adminiſtrator: in treſpaſs it is only ſaid that ſuch payments, if made by executor de ſon tort in a due courſe of adminiſtration, ſhall be recouped in damages. The paſſage cited from Mr. Juſtice *Buller's Niſi Prius* does indeed go the length of ſaying, that if the payments made by executor de ſon tort amount to the full value of the goods ſought to be recovered in the action of trover, the plaintiff ſhall be nonſuited: but the paſſage in *Carthew*, referred to in the margin, is directly contrary to that poſition. And a difference may eaſily be conceived between an action by a creditor againſt one who has intermeddled, and whom he ſues in the character of *executor* generally, which may eſtop the plaintiff from ſaying that the defendant is not lawful executor, and an action by the lawful adminiſtrator againſt ſuch intermeddler, to diſaffirm all his acts, and where the defendant is to juſtify or defend himſelf under the character of an executor de ſon tort. An act, therefore, may well be ſufficient to charge the party himſelf as executor de ſon tort, which would not be ſufficient to juſtify a wrong-doer claiming title under it. Here no poſſeſſion of the inteſtate's goods was proved in the widow before the moment of delivery. For aught appears there might have been no other act of her intermeddling or aſſuming to act as executrix. Then, with-

out

1804.

MOUNTFORD *against* GIBSON.

out any antecedent poſſeſſion proved, could ſhe, by the mere act of ſeizing the goods, give to the creditor all the effect of a delivery by the legal adminiſtrator? I find no principle nor authority in the law which will warrant that. The whole argument has been founded on an aſſumption, not warranted by the facts of the caſe before us, namely, the antecedent poſſeſſion of the inteſtate's property by the widow.

Grose J. The queſtion is, Whether the ſimple act of delivering theſe goods by the widow to the creditor of the inteſtate will ſo far make her an executrix de ſon tort, as againſt the lawful adminiſtrator, as to enable the creditor to protect himſelf under ſuch delivery in an action of trover for the goods brought by the adminiſtrator? *Read*'s caſe (*a*) ſeems to go the length of ſaying, that a ſtranger taking any of the inteſtate's goods and uſing or diſpoſing of them will make him an executor de ſon tort: for though, ſays Lord *Coke*, it was objected that he ought to pay a debt or legacy, *or do ſomething as executor*, yet it was reſolved and well agreed, that where no one takes upon himſelf to be executor, nor hath taken letters of adminiſtration, there the uſing of the goods of the deceaſed by any one, or the taking of them into his poſſeſſion, which is the office of an executor or adminiſtrator, is *a good adminiſtration to charge him* as executor of his own wrong. For, he adds, that thoſe to whom the deceaſed was indebted in ſuch caſe have not any other againſt whom they can have an action for the recovery of their debts. Now this may be well, if taken only to charge the party ſo intermeddling; but if applied to protect payments made by him, it will be neceſſary to en-

(*a*) 5 Rep. 33.

graft

1804.

MOUNTFORD *against* GIBSON.

graft on such disposing, &c. that it be done *in a course of administration*. For without that qualification, if any servant in the house of the deceased were to deliver goods to a creditor, the creditor might set up a right to retain them from the lawful executor, by saying that this was a delivery from one who was executor de son tort; although in no other instance affecting to act as executor. And it would be no answer to the lawful executor to tell him that he had his remedy over against a beggar. It would be most absurd and unjust if such a defence could be admitted. Therefore what is laid down in 5 *Rep.* must be taken with the qualification I have mentioned. But there is no pretence here for saying that the delivery of the goods in question was in the due course of administration. The only act of administering by the widow, as stated, was the act of delivering these very goods. But to entitle a party to defend his possession against the lawful administrator, under a delivery by an executor de son tort, it must have been made at least in the course of administration: and it was incumbent upon the defendant insisting upon it to prove that it was so made in this instance. That was not done, and therefore the facts of the case do not bear out the argument.

LAWRENCE J. Upon the opening of the plaintiff's case at the trial by his counsel, and the objection taken upon it by the counsel for the defendant, I understood that all the facts of the case had been stated which gave rise to the question of law: and I did not understand then that there were any other acts of intermeddling by the intestate's widow than the act complained of. But it was insisted that upon these facts (which he again reported as before stated), a title was conveyed to the creditor

1804.

MOUNTFORD *against* GIBSON.

ditor who took the goods upon the delivery of one who, by such intermeddling, had made herself executrix de son tort. This being the state of the case at the trial, I was not led at the time, nor did it then occur to me, to consider what effect the proof of other acts of administration by the widow would have had upon the question; I only gave my opinion upon the facts now before the Court; and upon these I think that the delivery of the goods by the widow can convey no title to the defendant. The *cases which have occurred, where payments by an executor de son tort have been recognized in actions brought against him by the rightful executor, have gone upon this ground, that the payments which were to be recouped in damages were such as the rightful executor or administrator would have been bound to have made; and therefore it could not be considered as any detriment to him that they were made by the executor de son tort. But the only foundation on which a creditor of the intestate can in any case make title to a payment or delivery to him out of the intestate's property by an executor de son tort is that he had fair reason for supposing that the person from whom he received such payment or delivery had a right to make it; as where such person avowedly took upon him the character of executor, and acted as such. But nothing of that sort was shewn here; no other previous act of administration by the widow. It was therefore contended at the trial, and so it appeared to me, that the defendant had, by thus taking the intestate's goods, made himself executor de son tort as much as the widow from whom he received them; for he concurred with her in the same wrongful act. It is indeed said that the opinion given by Lord *Holt*, in *Parker* v. *Kett*, goes to shew that a single act of intermeddling and making

pay-

1804.

MOUNTFORD *against* GIBSON.

payment to a creditor out of the inteftate's effects may be good as a payment by an executor de fon tort. But I do not think that that general conclufion is to be drawn from what is faid by Lord *Holt*. I do not mean to fay that a fingle act of intermeddling may not be fufficient for that purpofe, if it be fuch as may induce the creditor to think that the party fo intermeddling was the rightful executor. But I do not think that his meaning is to be carried further; for the words are, "creditors are not bound to feek further than him who acts as executor (*a*):" but a man muft have acted in fome way or other as executor before another can look to him as fuch. "And therefore (he inftances) if *an executor de fon tort* pay 100*l.* of the teftator's in a bag to a creditor, the rightful executor fhall not have trover and converfion againft the creditor." Lord *Holt* does not fay if *any perfon* pay the 100*l.*, but if *an executor de fon tort* pay it; that is, one who, as he had juft before defcribed, had *acted as executor*; one from whom the creditor might fuppofe that he had a right to claim payment. It has been alfo argued, that if this action had been brought againft the widow, charging her as executrix de fon tort, fhe would have been entitled to recoup this payment in damages. I doubt that. However I give no opinion upon it; but only wifh to be underftood as not being prepared to give my affent to it at prefent. When that queftion arifes it may be material to confider feveral authorities in the books. *Graysbrook* v. *Fox*, *Plowd.* 275. That was detinue brought by an executor againft the defendant, who had purchafed goods belonging to the teftator from one to whom the ordinary had, immediately after the teftator's death and before the

(*a*) 1 *Ld. Ray.* 661.

1804.

Mountford *against* Gibson.

executor had proved the will, granted administration: and it was holden that the executor who sued after probate obtained should recover. Now that was a much stronger case than this; because there the vendee had bought from the person who had actually taken out letters of administration at the time, though they were afterwards avoided upon the production of the will. And it was there said by *Walsh*, one of the Judges, who held with the plaintiff, that "if the defendant had averred that the administrator had aliened the goods to him for a certain sum, and had employed the money in discharge of the funeral, or of the debts of the deceased, or about other things which an executor should be forced to do, there the sale for such purposes should not be avoided, but should remain indefeasible: and the reason is, because by the commission of the administration to him by the ordinary, who was ignorant of the testament, he has *a colour of authority*, though it is not a rightful one; and he that has the right *suffers no disadvantage*, although he be bound by the act of the administrator; for it is no more than he himself was compellable to do, &c. And so, inasmuch as the administrator was compellable to do it, &c. it is reasonable, and no detriment to any one, that the thing done should remain stable and firm without impeachment." Now here there was no *colour of authority* proved in the widow, which is one of the reasons assigned why dispositions of the intestate's property by one who is not rightful executor or administrator shall in any case be deemed good; and the other reason is, that he who has the right *suffers no disadvantage*, being no more than *what he himself was compellable to do.* But neither does that appear in this case; for supposing there was not a sufficiency of assets, the administrator would have had a right to prefer him-

self;

felf; and if he would not have been bound to have done what the widow did, it cannot be faid that he has *fuffered no difadvantage*. So *Wentworth's Office of Executor*, 182, fpeaking of payments to be allowed to executors de fon tort, fays, "they muft, as he thinks, be underftood with this difference, viz. that this payment fhall ftand as againft other creditors, but not as againft the right executor or adminiftrator; for then a ftranger might ufurp the office of executor, and take from him that liberty of election to prefer which creditor he will in the firft payment: you might take from the executor power to pay himfelf before others, in cafe there were a debt due to him, which were very unreafonable." So here, for aught appeared, the delivery of thefe goods might take from the plaintiff, the lawful adminiftrator, the power of paying himfelf his own debt. And this is confirmed by what is faid in 2 *Blac. Com.* 507-8, that "in all actions by creditors againft an officious intruder he fhall be named an *executor* generally; for the moft obvious conclufion which ftrangers can form from his conduct is, *that he hath a will of the deceafed wherein he is named executor*, but hath not yet taken probate thereof. Then, after faying that he is chargeable with the debts of the deceafed, &c. he proceeds: "And though as againft the rightful executor or adminiftrator he cannot plead fuch payment, yet it fhall be allowed him in mitigation of damages, *unlefs, perhaps, upon a deficiency of affets, whereby the rightful executor may be prevented from fatisfying his own debt.*" Now I cannot reconcile all thefe authorities with the general doctrine contended for, that any payment made to a creditor by one who is executor de fon tort fhall be good againft the lawful adminiftrator. That doctrine is, I think, very queftionable. But it is fufficient to fay here that it did

 not

1804.

MOUNTFORD *against* GIBSON.

not appear that the widow had taken upon herself the administration of the intestate's effects in any other respect than in the single act of wrong complained of.

LE BLANC J. The case which appeared at the trial was, that this was an action of trover brought by the administrator to recover from the defendant the value of certain goods of the inteſtate, which the defendant had received after the inteſtate's death from his widow, who had at the time no title to them, nor any appearance or colour of title. To this ſtate of the caſe the authorities cited by the defendant's counſel have no application; and the dicta principally relied on muſt be taken with reference to the caſes then under conſideration, in which view they may be perfectly true, however doubtful taken generally. Some of the caſes eſtabliſh this point, that one who has intermeddled with the goods of an inteſtate, and is afterwards ſued as executor de ſon tort, ſhall be permitted to protect himſelf to the extent of ſuch payments out of the inteſtate's effects as he has rightfully made; by which I underſtand ſuch payments as he would have been bound to make if he had been rightful executor. The caſes have alſo gone further, and decided that a creditor of the inteſtate, who has received payment from one who appeared to be acting as rightful executor, might protect himſelf under ſuch payment: with this diſtinction, however, that where a perſon has intermeddled wrongfully, by which he has made himſelf what is called an executor de ſon tort, when he is ſued as executor, there, inaſmuch as the law obliges him to pay the demands of all the creditors of the inteſtate who may ſue him, to the extent of the goods come to his hands; ſo, on the other hand, the law allows that where he

1804.

MOUNTFORD *against* GIBSON.

he was bound to pay other creditors he may defend himself in an action against the rightful executor or administrator for all payments which he was bound to make. But this is a very different case: if it had appeared here that the defendant had received the goods from a person from whom he was in a condition to have enforced payment by law, by shewing that she was executrix de son tort, he might have brought himself within some of the authorities which have been cited: but there was no evidence of her being executrix de son tort at the time but the very act of wrong complained of in the delivery of these goods; and that is the only act now set up as giving title to the defendant. But that act of wrong of the widow, connected as it was with the defendant's own act of receiving the goods, shall never be set up as giving title in itself against the rightful administrator. At the time of the delivery the widow had not holden out to the world any visible act to shew that she had a right to make such delivery to the defendant.

Rule discharged.

JONES *against* ASHBURNHAM and NANCY his Wife.

Tuesday, Jan. 31.

Where the plaintiff declared that *A*, since deceased, was indebted to him so much, and that after his death, in consideration of the premises, and that he, at the instance of the defendant, *would forbear and give day of payment* of the debt (not stating *against whom he was to forbear*) the defendant promised, &c.: held on demurrer to be no consideration for the promise; for a promise can only be sustained on a consideration of benefit to the defendant or of detriment to the plaintiff: and unless there were some person whom the plaintiff could have sued for his debt, his forbearance was no detriment to him.

THE plaintiff declared that whereas one *S. F. Bancroft*, since deceased, at the time of his death was indebted to him in 58*l.* for goods before that time sold and delivered to the deceased, whereof the defendant *Nancy* had notice, and thereupon, after the death of *Ban-*

1804.

Mountford *against* Gibson.

croft, the defendant *Nancy*, before her intermarriage with the other defendant *Ashburnham*, *in consideration of the premises*, and also *in consideration that the plaintiff*, at the special instance and request of the defendant *Nancy*, *would forbear and give day of payment of the said* 58l. *as aftermentioned*, she the said *Nancy*, by a note in writing signed by her according to the form of the statute, &c. on the 20th of *March* 1801, *undertook and promised the plaintiff to discharge the said debt so due and owing to him in a reasonable time, and to send him* 20l. *in part payment in the* July *following*: And although the same *July* is long since passed, during which the said *Nancy* continued sole, and a reasonable time elapsed for the payment of the whole 58*l.*, according to the tenor and effect of the said promise, and *though the plaintiff has always from the time of making the said promise hitherto forborne and given day of payment of the said debt*, whereof the defendant *Nancy* before her intermarriage, and both the defendants since their intermarriage, have had due notice, yet the defendants have respectively, &c. refused to pay, &c. There were other counts in substance the same; one alleging the forbearance to be *till July*, &c. To all which there was a demurrer, assigning for special causes; that it is not alleged in the declaration from whom the said sum of 58*l.* therein mentioned was due and owing to the plaintiff at the time when the defendant *Nancy* is supposed to have made the promise and undertaking mentioned, or that any persons or person were or was then liable to pay the plaintiff that sum; and that it is not alleged to whom the plaintiff hath forborne and given day of payment of the said 58*l.*; and that the declaration does not disclose any legal and sufficient consideration for the supposed promise; nor does it thereby appear that the plaintiff

plaintiff has any good cause of action against the defendants, &c. 1804.

JONES *against* ASHBURNHAM.

Marryat in support of the demurrer. This is a promise made by a stranger to the original contract or consideration for the supposed forbearance. But a promise to forbear generally is not a sufficient foundation for an assumpsit without shewing a person who was liable to pay the debt. If the promise had been laid barely for forbearing to sue the defendant, it not appearing that she was before liable for any debt to the plaintiff, the action could not have been sustained: then it cannot aid the plaint that a debt is stated to be due to the plaintiff, without stating any person from whom he could have enforced payment. It is not enough that there may be some person liable to him in rerum naturâ who is unknown. All the cases upon the subject are collected in 1 *Com. Dig.* 160., *Action upon the Case upon Assumpsit*, F. 8., which shew that no action can be maintained upon an assumpsit in consideration of forbearance where the party was not chargeable; as in the case of an heir who has no assets. This case is not distinguishable in principle from those. To sustain such an action the plaintiff must shew that he was in a situation *to forbear* some person whom he might have sued, whom it would have been beneficial to him to have sued, and, consequently, whom it was detrimental to him to forbear suing. Here it is not shewn that any person was liable to the plaintiff at the time of the promise made; for the original debtor was dead, and no representation was taken out, nor, for aught appears, any assets, nor any suit surceased in consequence of the promise which the plaintiff would have supported. In

1804.

JONES *against* ASHBURNHAM.

In *Smith* v. *Jones* (*a*), the plaintiff declared that his father bequeathed him a legacy of 7*l.* and made *C.* his executrix, and died, and that the defendant intermarried with *C.*; and that in confideration that affets of the plaintiff's father came into the hands of the defendant, and in confideration that the plaintiff would forbear (*b*) the 7*l.* till *All Saints* following, the defendant promifed to pay it at that time: and then the plaintiff fhewed that he had forborne, &c. till the day, yet the defendant had not paid him. The defendant pleaded that *C.*, the executrix of the father, died inteftate at fuch a place *before the promife made*: upon which the plaintiff demurred; and judgment was given againft him; for by the death of the executrix before the promife, it appeared that there was not any confideration fufficient to charge the defendant, who was not chargeable with the legacy after the death of his wife, the executrix. The report ftates further, that the declaration was alfo holden ill, "*becaufe it did not fhew precifely what perfon the plaintiff was to forbear to fue for the* 7*l.*; for it could not be intended that he fhould forbear the defendant, who it appeared by law was not chargeable with it." So in *Rofyer* v. *Langdale* (*c*), the plaintiff declared againft a feme adminiftratrix, that fhe, *in confideration that he would forbear fuit until fhe had taken out letters of adminiftration*, promifed to pay him a certain fum owing to him by her inteftate. And after verdict and judgment, error was brought; for that the plaintiff had fet forth no confideration for the affumpfit; for till adminiftration taken out by the defendant fhe was not liable

(*a*) *Yelv.* 184.

(*b*) *i. e.* forbear to fue the defendant for the 7 *l.* according to the report of the S. C. in *Cro. Jac.* 257.

(*c*) *Sty.* 248. and *vide Hayward* v. *Duckett*, *ib.* 405.

to

1804.

JONES *against* ASHBURNHAM.

to be fued, except there were a caufe depending, which there was not. And this was holden to be a good exception. The fubfequent cafe indeed, of *Hume* v. *Hinton* (*a*), may feem to contradict that, where it was holden that a general forbearance *of the debt* was in effect a forbearance to fue all the world, and was fufficient to uphold an affumpfit, without fhewing that any particular perfon was liable to pay: but that, it is to be obferved, was after verdict, when it might be prefumed that fome perfon was fhewn to be liable. And further, it is faid to have been decided upon the authority of a cafe of *Hill* v. *Bailey*, over-ruling that of *Smith* v. *Jones*. But in *Hill* v. *Bailey*, which is reported in 1 *Rol. Abr.* 22. (*b*), there was an averment that the goods of the plaintiff's debtor came *legitimo modo* after his death to the defendant, who, in confideration that the plaintiff would *forbear his debt*, promifed to pay it. There was, therefore, a good confideration for the promife to forbear generally. And in *Reynolds* v. *Proffer* (*c*), *Hardres*, in argument, cites the fame cafe of *Hume* v. *Hinton* (under the name of *Hummers* v. *Hunton*), as having been adjudged to be *no* confideration to fuftain the promife. There is another cafe which may be cited for the plaintiff, of *Quick* v. *Copleton* (*d*), where the defendant's late hufband being indebted to the plaintiff, and the defendant about to come to *London*, and in fear of being arrefted by the plaintiff, fhe promifed to pay him in confideration that he would not trouble her, and would forbear till *Michaelmas*. And after verdict it was moved in arreft of judgment, that fhe not being fhewn to be executrix or adminiftratrix, her forbearance was not any confideration; which was agreed by the

(*a*) *Sty.* 304. (*b*) And *vide* 1 *Danv. Abr.* 50.
(*c*) *Hardr.* 73. (*d*) 1 *Lev* 161. 1 *Sid.* 242. and 1 *Keb.* 866.

Court;

1804.

Jones *against* Ashburnham.

Court: but they held that the subsequent words, *forbear till Michaelmas*, were general, not only to forbear her but all others, and made a good consideration. But the opinion afterwards delivered by *Hyde* C. J. very much shakes the authority of this case; for he says that a forbearance to sue one *who fears to be sued* is a good consideration; which certainly cannot be maintained: and he cited a case in *C. B.* when he sat there, where a woman, who feared that the dead body of her son would be arrested for debt, was holden liable upon a promise to pay in consideration of forbearance, though she was neither executrix nor administratrix. But of this the other Judges are said to have doubted. [Lord *Ellenborough* C. J. It is impossible to contend that this last forbearance could be a good consideration for an assumpsit; for to seize a dead body upon any such pretence would be contra bonos mores, and an extortion upon the relatives.] The weight then of the authorities is with the defendant, as the principle clearly is with him. For as where the forbearance is stated to be of the defendant himself, the plaintiff must shew that he was before liable to be sued; so when the forbearance is general, of all the world, it is equally reasonable that the plaintiff should shew some one person who was liable to him: for the forbearance of a groundless suit has been holden to be no consideration for an assumpsit; as in *Tooley* v. *Windham* (*a*), and *Lloyd* v. *Lee* (*b*). Here the defendant is not shewn to be executrix or administratrix, or to have assets; and a promise even by an executor, as such, is a mere nudum pactum without assets at the time (*c*).

(*a*) Cro Eliz 206. (*b*) 1 Stra. 94.

(*c*) Rann v Hughes, 7 Term Rep 350 n a.

Jervis

1804.

JONES *against* ASHBURNHAM.

Jervis contrà. The confideration of general forbearance, as here laid, is fufficient to maintain the affumpfit. To fuftain a promife the confideration muft either be beneficial to the defendant or detrimental to the plaintiff. In *Pillans* v. *Van Mierop* (*a*), *Yates* J. fays, "Any damage to another, or fufpenfion or forbearance of his right, is a foundation for an undertaking, and will make it binding, though no actual benefit accrue to the party undertaking:" He adds, that there "the promife and undertaking of the defendants did occafion a *poffibility of lofs* to the plaintiffs." It is part of the definition that there muft be a *right* in the plaintiff; which furnifhes an anfwer to the cafes of *Tooley* v. *Windham* (*b*) and *Lloyd* v. *Lee* (*c*), where no fuch right appeared. Now here the plaintiff fhews a debt due, and a right to recover, though not againft any perfon named: but it is enough that he fhews a poffibility of lofs by the forbearance. [Lord *Ellenborough* C. J. It is not entitled to the name of *forbearance* unlefs you fhew fomething or fomebody to be forborne. If there be a right which can be enforced againft any body, no doubt that a promife to forbear is a good confideration: but if there be no perfon liable, how is it entitled to the name or quality of *forbearance*?] The cafes fhew that it is fufficient if there be a right in the plaintiff, which is forborne, though not fhewn to be capable of being enforced at the time againft any particular perfon; as in *Quick* v. *Copleton* (*d*), where the confideration relied on by the Court was not the *fear* of being fued, but the *general forbearance*, "to forbear till *Michaelmas*." And yet it was not averred there that either the defendant or any

(*a*) 3 *Burr.* 1673. (*b*) *Cro. Eliz.* 206

(*c*) 1 *Stra.* 94. (*d*) 1 *Lev.* 161. 1 *Sid.* 242. 1 *Keb* 866.

1804.

JONES *against* ASHBURNHAM.

any other person was executrix, &c. of the deceased debtor; and consequently no person appeared to be liable to the plaintiff at the time. So in the case of *Hill* v. *Bailey* in 1 *Rol. Abr.* 22., the consideration relied on was not that the goods of the deceased debtor came to the defendant's hands *legitimo modo*, for then there was no occasion to lay any *forbearance;* but the judgment turned on the sufficiency of the general forbearance to sue, to sustain the assumpsit. [*Lawrence* J. The promise to forbear goes farther than the lawful possession of assets; for it makes the defendant liable to judgment de bonis propriis, and not merely as far as the assets go.] Then the case of *Hume* v. *Hinton* (*a*) is in point (which is merely misquoted by *Hardres* (*b*) in argument), and that was subsequent to *Smith* v. *Jones* (*c*), which, it appears from all the reports of it taken together, was a promise, not for forbearance *generally*, but to forbear *the defendant;* which reconciles the authorities: and the same answer will apply to *Rosyer* v. *Langdale* (*d*), which was a promise in consideration that the plaintiff would *forbear suit* until the defendant had taken out administration; which was taken to mean a forbearance to sue *the defendant*. But where a person is sued *as executor*, which was the case in *Rann* v. *Hughes* (*e*), his liability on a promise to pay can only be coextensive with his original liability in respect of assets.

Marryat, in reply, was stopped by the Court.

(*a*) *Sty.* 304. (*b*) *Hardr.* 73.
(*c*) *Yelv.* 184. *Cro. Jac.* 257. *Owen.* 133.
(*d*) *Sty.* 248. (*e*) 7 *Term Rep.* 350. n.

Lord

1804.

JONES *against* ASHBURNHAM.

Lord ELLENBOROUGH C. J. The way in which I am difpofed to confider this cafe will break in upon no recognized rule of law, nor on the plain fenfe of what was laid down by Mr. Juftice *Yates*, in the cafe of *Pillans* v. *Van Mierop*. It is a known rule of law, that to make a promife obligatory there muft be fome benefit to the party making it, or fome detriment to the party to whom it is made; otherwife it is confidered as nudum pactum and cannot be enforced. I do not fay that the opinion which I have formed will not break in on any of the cafes which have been cited, but it entrenches on no general rule; and in order to fhew that, I will examine the rule referred to as laid down by Mr. Juftice *Yates*, and fee how it applies to the prefent cafe. He fays that "any damage to another, or fufpenfion or forbearance of his right, is a foundation for an undertaking," &c. Now how does the plaintiff fhew any *damage* to himfelf by forbearing to fue, when there was no fund which could be the object of fuit: where it does not appear that any perfon in rerum naturâ was liable to be fued by him? No *right* can exift in this vague, abftract, and indefinite way. *Right* is a correlative term: there muft be fome object of right; fome object of fuit; fome party who, in refpect of fome fund or fome character known in the law, is liable; otherwife there cannot be faid to be any *right*. Has there been then any *fufpenfion* of the plaintiff's right? Now unlefs a right is capable of being exercifed, unlefs it can be put in force, there can be no fufpenfion of it. And that it could have been exercifed or put in force, but for the promife made by the defendant, is not fhewn. Then what *forbearance* is fhewn? It muft be a *forbearance* of a right which may be enforced with effect. It is true that a promife may be binding though there may be no

actual

1804.

JONES *against* ASHBURNHAM.

actual benefit resulting to the party making it, because it is enough if the plaintiff may be damaged by it; but it does not appear here that the forbearance could produce any detriment to the plaintiff. It does not therefore appear that Mr. Justice *Yates* laid down any doctrine which does not square with the general received rule of law, that to sustain a promise there must be a benefit on the one hand or a detriment on the other. But here, whether there were any representative or any funds of the original debtor does not appear. Then, as to the cases cited, that of *Rosyer* v. *Langdale* is strong to the purpose; for it was there decided that a promise in consideration that the plaintiff would forbear suit until the defendant had taken out letters of administration was without foundation, because it did not appear that the party was liable before administration taken out. And this was rightly determined; for forbearance of an unfounded suit is no forbearance. But this case is attempted to be met by that of *Hume* v. *Hinton*, in the same book, where a promise by the mother of an intestate indebted to the plaintiff, that if he would stay for the money till a given day she would pay it, was sustained. That, however, was after verdict; and that is material to be attended to, because it might be presumed to have been proved that the defendant had so intermeddled with the intestate's effects as to make herself liable as executrix de son tort, and had funds of the deceased in her hands for which, but for the promise made, she might have been sued in that character. But no such intendment can be made here. The case of *Quick* v. *Copleton* is also relied on. That too was after verdict; and it was moved in arrest of judgment, for want of consideration. I think that even after verdict, that declaration would be bad,

4 being

1804.

JONES *against* ASHBURNHAM.

being vicious on the face of it. It is ſtated that the defendant's late huſband was indebted to the plaintiff, and that ſhe (not ſtating her to be cloathed with any repreſentative character) about to come to *London*, and *being in fear to be arreſted by the plaintiff*, promiſed, &c. Now an attempt to impoſe upon a perſon an unlawful terror, (and the threatening of an unlawful ſuit is as bad), can never be a good conſideration for a promiſe to pay: yet that ground is inſiſted on by the Chief Juſtice. And as to the caſe there cited by him, of a mother who promiſed to pay, on forbearance of the plaintiff to arreſt the dead body of her ſon, which ſhe feared he was about to do; it is contrary to every principle of law and moral feeling. Such an act is revolting to humanity, and illegal; and therefore any promiſe extorted by the fear of it could never be valid in law. It might as well be ſaid that a promiſe, in conſideration that one would withdraw a piſtol from another's breaſt, could be enforced againſt the party acting under ſuch unlawful terror. Here, there being no conſideration of benefit to the defendant, or of detriment or poſſibility of detriment to the plaintiff, ſhewn by him on the face of the declaration, and this coming on upon demurrer, where nothing can be intended, as it may after verdict, I am clearly of opinion that the declaration is bad.

GROSE J. It muſt be admitted, that if a conſideration for the promiſe do not ſufficiently appear upon the face of the declaration, it cannot be ſupported. There is a great difference between queſtions of this ſort, ariſing upon demurrer to the declaration, and in arreſt of judgment after verdict; in which latter caſe every thing is to be intended which can be in favour of the verdict: but not ſo on demurrer. It is however ſaid, that a detriment

1804. to the plaintiff will support an assumpsit as well as a benefit to the defendant, and that here the plaintiff alleges a *forbearance*. But it is a perversion of terms to call that

ASHBURNHAM. a *forbearance to sue* if there were no person who was capable of being sued: and here none is shewn. There can be no forbearance in such a case; and therefore there is an end of the consideration. This is too plain to require any thing further to be said upon it, and makes it unnecessary, after what my Lord has said, to enter into the consideration of the cases.

LAWRENCE J. This question arises upon a special demurrer, which points out an objection to the declaration, that no person is stated who was liable to be sued at the time of the promise made, in respect to whom the plaintiff can be said to have forborne suit. And on this ground the case is distinguishable from those relied on by the plaintiff's counsel, which were after verdict; and in support of which it might be said that when the jury found that the plaintiff *did forbear to sue*, they must be presumed to have found, upon proof laid before them, that there was somebody who could have been sued. But no such intendment can be made upon demurrer. The argument proceeds upon a falacy, in supposing that some person must exist liable to the plaintiff's suit, to forbear whom must consequently be a disadvantage to him, and a consideration for the defendant's promise. But that is not so. The deceased might leave no assets, and there might be no administration to him taken out: there would then be no person to sue. So he might be a bastard and have no legal representatives entitled to take out administration of his effects, in which case the Crown would be entitled to them; and still there would be nobody to be sued. It

1804.

JONES *against* ASHBURNHAM.

is not therefore true that there must be somebody liable to whom a forbearance to sue may refer. And I agree with the argument of the defendant's counsel that if it be no consideration for the promise to forbear *to sue the defendant* without shewing that the defendant was before liable to have been sued, it can be no consideration for a promise to forbear to sue all the world generally, without shewing that some person or other was liable to be sued: for without that, the plaintiff does not shew any detriment arising to him from the forbearance of his suit. The principle is admitted that the plaintiff must shew some benefit to the defendant or some detriment to himself. And I understand Mr. Justice *Yates*, in illustrating that principle in the passage cited, to say that where it appears on the face of the declaration that there is somebody whom the plaintiff may sue, it is not necessary to shew that he would be benefited by suing him; it is sufficient that there is some person whom he might sue, and from whom he might obtain satisfaction.

LE BLANC J. The definition by Mr. Justice *Yates* of a consideration sufficient to maintain a promise is, that it be either of some benefit to the defendant or some detriment to the plaintiff. It is sufficient, if it be a detriment to the plaintiff, though no actual benefit accrue to the party undertaking. So far only the definition goes. Afterwards, indeed, in commenting on that definition, he says, that the promise of the defendant did occasion a possibility of loss to the plaintiffs. They *might*, he says, have been thereby prevented from resorting to the original debtor, or getting further security from him. But all this latter part is only a comment on the definition, and shewing how the case then in judgment applied to it.

1804.

JONES *against* ASHBURNHAM

But I do not take it to be any part of the definition itself intended to be laid down by him, that if any person stated that he had forborne suing on a cause of action which *might* (or might not) *by possibility* occasion a loss to him, that was a sufficient ground for an undertaking by another to pay him. Now here the plaintiff endeavours to make out a detriment to himself by shewing that one deceased was indebted to him, and that in consideration that he would forbear and give day of payment the defendant promised, &c. But it does not follow of course from thence that any detriment arose to the plaintiff from his forbearance, if it do not appear that there was any person whom he could have sued. And the general current of authorities shews that it is not sufficient to state a consideration to forbear generally, unless it be also shewn that there was some person to be forborne. Now here the declaration does not state that there was any representative of the debtor, or that any person had taken out administration to him, or that any person was going to administer to the effects and to satisfy the plaintiff's debt, but was prevented from so doing by the undertaking of the defendant. There, therefore, appears to be a want of consideration to sustain the promise.

Judgment for the Defendant.

1804.

CHETHAM *against* WILLIAMSON and Others.

Friday, Jan. 3d.

A. being mortgagee in fee of certain lands, and *B.* the mortgagor entitled to the equity of redemption, by lease and release, *A.* conveys and *B* releases the lands to *C* in fee, who by the same instrument covenants with and grants to *B.* that it shall be lawful for *B.*, his heirs and assigns at all times to enter upon the lands to search and dig for coal, and to take and carry away the same to his and their own use. This is only a licence, and conveys no interest in the soil so as to exclude *C* and those claiming under him from getting coal there; nor could it operate as an exception or reservation out of the grant in respect to *B*, who had not the legal title in him at the time.

IN trover for so many horse loads of coals, a special verdict was found, stating in substance,

That one *Richard Nettleton*, being seized in fee, subject to an equity of redemption in one *Edward Hyde*, of certain lands and tenements in *Haughton*, in the parish of *Manchester*, in the county of *Lancaster*, by an indenture of lease of the 28th of *March*, 6 *W.* & *M.* between the said *R. Nettleton* of the first part and *D. Hobson* of the second part, and by another indenture of release, of the 29th of *March*, between the same parties of the first and second part, and the said *Edward Hyde* of the third part; in consideration of 5*s.* paid by *Hobson* to *Nettleton*, and of 63*l.* paid by *Hobson* to *Hyde*, *Nettleton granted, released, and confirmed* to *Hobson* and his heirs the said premises, to have and to hold the same to *Hobson* and his heirs; and *E. Hyde* thereby *released* to *Hobson* and his heirs all his power, title, and equity of redemption, and all his right, title, estate, &c. in the premises. The special verdict then set out the last-mentioned indenture verbatim, which, after reciting that the same premises had been before conveyed in mortgage by *Hyde* to *Nettleton* and his heirs, witnessed that *Nettleton*, at the instance of *Hyde*, and for the said consideration of 63*l.* paid by *Hobson* to *Hyde*, granted, released, and confirmed to *Hobson* the premises, &c. in *Haughton*, then in the tenure of *Hobson*, habendum to *Hobson* and his heirs, with all ways, liberties, easements, profits, &c. absolutely without any equity of redemption, and *Hyde* thereby *released* to *Hobson* and his heirs all his equity of redemption, and all his right, title, interest, estate, claim, and demand whatsoever in the

1804.

CHETHAM *against* WILLIAMSON.

same premises. And *Hobson* covenanted and granted to *Hyde* and his heirs an annual rent of 19*s.* 4*d.* payable out of the premises, with a power of entering and distraining for the same in case of non-payment at the time. And *Hobson* further covenanted, and granted, for himself, his heirs, &c. to *Hyde* and his heirs, &c. "that it shall and may be "lawful to and for the said *E. Hyde*, his heirs, &c. at all "times hereafter to enter into all or any part of the pre-"mises to search for and dig for coal or stone, or any "other mine or mineral whatsoever, and the same to "take, have, and carry away to their own use; provided "and upon condition that it shall and may be lawful to "and for the said *D. Hobson*, his heirs, &c. and the oc-"cupiers of the premises, to have and take, by way of "deduction and allowance, all or so much of the rent of "19 shillings and fourpence aforesaid as shall be reason-"able for any hurt, damage, or prejudice that shall be "done to the premises by reason of digging for or car-"rying away of any mine or mines as aforesaid." And *Hobson* likewise covenanted with and granted to *Hyde*, his heirs, &c. to suffer and permit *Hyde*, his heirs, &c. or agents, to hunt, &c. upon the premises, and take the game, &c. The special verdict then found the seisin of *Hobson*, by virtue of the indenture and the statute of uses, in the premises thereby meant to be conveyed to him. It then stated, that the said *E. Hyde* in his lifetime was also seised in fee of other lands in *Haughton*, and that he conveyed the same in several parcels to other persons respectively by indenture of lease and release, to which *Hobson* was also a party, made in the same form, and containing the same exceptions, reservations, gifts, grants, and covenants as were contained in the before-mentioned indentures of lease and release to *Hobson*. And that after-

wards,

1804. CHETHAM *against* WILLIAMSON.

wards, on the 1ſt of *January* 1777, all the eſtate, right, title, intereſt, and property granted and conveyed to *Hobſon* by the ſaid indentures of leaſe and releaſe, of the 28th and 29th of *March* 6 *W.* & *M.*, and alſo granted and conveyed to the ſaid ſeveral other perſons by indentures of leaſe and releaſe, by divers meſne deſcents and conveyances became and were veſted in *George Hyde Clarke*, as tenant for life thereof, without impeachment of waſte, and that he is now ſeiſed thereof for his life, without impeachment of waſte. That on the 1ſt of *January* 1781, all the eſtate, right, title, intereſt, property, claim, demand, and power of the ſaid *Ed. Hyde*, which was excepted, reſerved, given, granted, or conveyed to him by the ſaid indentures of leaſe and releaſe, became and were by divers meſne aſſignments and conveyances veſted in the plaintiff *Chetham* in fee, who is now entitled thereto in the ſame and in as ample and beneficial a manner as the ſaid *Ed. Hyde* would have been if now living. That on the 1ſt of *January* 1781, all the eſtate, right, title, intereſt, property, claim, demand, and power of the ſaid *E. Hyde*, which was excepted, reſerved, given, granted, or conveyed to him by the ſaid other conveyances to the ſaid other perſons reſpectively, became and were, by divers meſne deſcents and conveyances, veſted in the plaintiff in fee; and that he is now entitled thereto in the ſame and in as ample and beneficial a manner as the ſaid *E. Hyde* would have been if now living. That upwards of 60 years ago, and alſo within 60 years, the perſons reſpectively claiming under the ſaid *E. Hyde* by virtue of the exception, reſervation, gift, grant, or conveyance to him in the ſaid indentures of leaſe and releaſe above particularly mentioned, and their reſpective leſſees and agents, have from time to time at their plea-

1804.

CHETHAM *against* WILLIAMSON.

ſure dug and got coals for their own uſe under the premiſes mentioned in the ſaid indentures of leaſe and releaſe above particularly mentioned, and have from time to time paid or allowed to the perſons who were owners or tenants of the eſtate and intereſt conveyed to the ſaid *D. Hobſon*, as aforeſaid, different ſums of money as compenſations for the injury from time to time done to the land. The ſpecial verdict then ſet forth an agreement in writing, made on the 4th of *November* 1782, at *Preſton*, between the plaintiff and one *Fletcher*, and ſigned by them, (which *Fletcher* was then an agent of the ſaid *G. Hyde Clarke* for the management of his collieries in *Haughton*, worked by a water engine, *G. H. Clarke* then being reſident in the iſland of *Jamaica*; and which *Fletcher* made the agreement on the behalf of *G. H. Clarke* without any ſpecial authority for that purpoſe from *G. H. Clarke*, and without his (*Fletcher*'s) having any knowledge of the ſaid indentures of leaſe and releaſe,) whereby it was agreed between the plaintiff and *Fletcher* as follows; "1ſt, Mr. *Chetham* agrees to ſet all his coals in *Haughton* that lie above the level of or can be laid dry by Mr. *Clarke*'s preſent water engine in *Haughton* to Mr. *Clarke* of *Hyde*, except ſo much of his coal as is in a meadow in *Haughton* called *Jaſper Meadow* in the occupation of *S. Hague*, which coal in ſaid meadow Mr. *Chetham* agrees to ſet to Mr. *Arden* of *Stockport*, together with the liberty of ſinking pits, &c. for the getting and vending the ſame. 2d, Mr. *Clarke* and Mr. *Arden* to begin with all convenient ſpeed to prepare for getting ſaid coal reſpectively, and work the ſaid intended collieries in a regular and proper manner, ſo as to get ſaid coal in its due courſe with their other coal in other lands adjoining, according to the uſual method, &c. 3d, Mr. *Clarke* and Mr. *Arden* to render an

account

1804.

CHETHAM *against* WILLIAMSON.

account once in each month if required of all coal which ſhall have been gotten and ſold by them reſpectively, and ſuffer Mr. *Chetham* to inſpect the colliery books, &c. and once in every quarter of a year pay one penny for every horſe load of coal ſo gotten and ſold; and alſo to allow Mr. *Chetham* to take and carry away for the uſe of his own fire two horſe loads of coal from each of their coal pits weekly, &c. 4th, Mr. *Chetham* not at any time to do or ſuffer any thing whereby the ſaid collieries of Mr. *Clarke* or Mr. *Arden* may be injured, &c. And, laſtly, Mr. *Chetham* agrees to execute a leaſe to Mr. *Arden* and Mr. *Clarke* as ſoon as leaſes and counterparts can be prepared agreeable to the above conditions. It is at the ſame time agreed that Mr. *Chetham* is to have the liberty of appointing one collier to be employed at each pit, and ſuch collier to be paid the uſual wages by Mr. *Arden* and Mr. *Clarke*, he doing the like work." That ſuch part of the coals mentioned in the indentures of leaſe and releaſe of the 28th and 29th of *March*, 6 *W* & *M.*, as lie above the level of or could be laid dry by the water engine of the ſaid *G. H. Clarke* in the agreement mentioned, are part of the coals compriſed in the above agreement. That *G. H. Clarke*, after the making ſuch agreement, aſſented to it, and by virtue thereof from time to time got the coal lying above the level of his ſaid water engine, and he and his agents or leſſees have regularly from time to time hitherto paid to the plaintiff one penny for every horſe load of coal gotten under the ſaid agreement. That the plaintiff has from time to time ſince the making of the ſaid agreement appointed a collier, who has been employed at each pit by *G. H. Clarke*, and been paid by him according to the agreement. That *G. H. Clarke* afterwards, on the 22d of *December* 1798, demiſed to the de-

fendants

1804.

CHETHAM *against* WILLIAMSON.

fendants the coal mines mentioned in the agreement, together with his other coal mines in *Haughton*, as tenants from year to year, who entered and were poſſeſſed of the ſame. It then ſtated that the defendants got the coals in queſtion under the premiſes mentioned in the indentures of leaſe and releaſe of the 28th and 29th of *March*, 6 *W.* & *M.*, which coals were gotten by them under a level of the water engine of *G. H. Clarke* mentioned in the agreement, and that no part of the ſaid coals could be laid dry by the ſaid water engine; and that no part of the ſaid coals were compriſed in the ſaid agreement. That notice was given by the plaintiff to the defendants not to get the coals ſo ſituated, and that the defendants, after ſuch notices, got and converted the ſame to their own uſe, &c.

Littledale for the plaintiff, after ſtating the queſtion to be, Whether *Edward Hyde*, the releaſor, had an excluſive right to the coal under the lands thereby conveyed, or only a concurrent right with *Daniel Hobſon*, the releaſee, from whom the defendant claimed, contended that the covenant whereby *Hobſon* "covenanted and granted to *Ed. Hyde* and his heirs, &c. that it ſhould and might be lawful for *E. H.*, his heirs, &c. at all times to enter into all or any part of the premiſes to dig for coal, &c. and carry it away," &c. which covenant was contained in the indenture whereby *Nettleton*, the mortgagee, at the inſtance of *Ed. Hyde*, conveyed the legal eſtate, and *E. Hyde* releaſed his equity of redemption to *Hobſon*, did amount to a reſervation and exception of the coal in the grant to *Hobſon*, the legal eſtate and inheritance of which remained in *Ed. Hyde* and thoſe claiming under him. *Shep. Touch.* 77. *Shep. Com. Aſſur.* 303. *Co. Lit.* 47. *a*, which latter (*n.* 7.) notes *Drake* v. *Munday*, *Cro.* *Car.*

1804.

CHETHAM *against* WILLIAMSON.

Car. 207.; where there was a leafe for years by indenture, and the leffee covenanted to pay 5*l.* a-year; and held to be a refervation. [Lord *Ellenborough* C. J. Is there not a general rule which overrides all thefe cafes, namely, that the words of the deed fhall enure according to the apparent intent of the parties, as by law it may; as in Lord *Mountjoy*'s cafe, *Moor*, 174.; where a *provifo*, though ufually taken as a word of condition or covenant, yet coupled with and explained by other words, was holden to operate as a word of grant? There is no magic in words.] Here then the intent was that *Ed. Hyde* fhould have the exclufive right to the coal; and Lord *Mountjoy*'s cafe is an authority for that conftruction. And there need no authority to fhew that *Ed. Hyde* had a fee. Lord *Mountjoy*'s cafe is more fully reported in 1 *And.* 307., where it is ftated that he, being feifed of two parts of the manor of *Sorford*, by indenture inrolled, bargained and fold the fame to *J.* and *C. B.* and to the heirs of *J.*; which indenture, after feveral covenants, proceeded thus: "Provided always and it is covenanted, granted, concluded, and agreed between the faid parties, and the faid *J.* and *C. B.* and their heirs covenant and grant to and with Lord *Mountjoy*, his heirs, &c. that it fhall be lawful to and for the faid Ld. *M.*, his heirs, &c. at all times hereafter to have, take, and dig in and upon the heath ground of the premifes from time to time fufficient ores, heath turves, &c. for the making of allum or copperas, and to build, &c. without let or interruption of the faid *J.* and *C. B.*, their heirs," &c. And the opinion of the Judges, amongft other points, was, 1. that the two parts were fufficiently conveyed to the faid *J.* and *C. B.* abfolutely without any condition; 2. that Ld. *M.* by the affurance paffed by him and *J.* and *C. B.* had fufficient intereft

and

1804. and right in fee to dig such turves, ore, &c. as mentioned in the proviso. [*Lawrence* J. There Lord *Mountjoy* was seised of the legal estate at the time of the grant, which makes all the difference.] Lord *Mountjoy*'s case was only a liberty to dig ore, &c. for a particular purpose.

CHETHAM *against* WILLIAMSON.

Lord ELLENBOROUGH C. J. Even if *E. Hyde* had been seised of the legal estate, which he was not, yet the liberty reserved of digging for coals could not give him the exclusive right to them. No case can be named where one who has only a liberty of digging for coals in another's soil has an exclusive right to the coals, so as to enable him to maintain trover against the owner of the estate for coals raised by him. The case of Lord *Mountjoy*, as cited from *Anderson*, is decisive against the plaintiff; and still more as it is reported in *Godbolt* (*a*), which is directly in point. Those who compared it to a grant of common sans nombre used that as the strongest instance to shew that it could not be an exclusive right.

LAWRENCE J. The covenant in this case cannot operate as an exception or reservation in favour of *Ed. Hyde*, who had no legal estate in him at the time, but only the equity of redemption. He was in law no more than a stranger to the estate, and could not except or reserve that which he had not before. The covenant, therefore, can only operate as a grant; but a grant will not pass the land itself without livery.

Per Curiam, Judgment for the Defendant.

Wood was to have argued for the defendant.

(*a*) *Godb.* 17. And *vide* also 4 *Leon.* 147. S. C., where it is said that the Justices " were of opinion that *Brown* and his heirs, notwithstanding the grant to the lord, owners of the soil there might dig there."

1804.

HALL *against* CAZENOVE.

Friday, Feb. 3d.

One may declare in covenant that the deed was *indented, made, and concluded* on a day subsequent to the day on which the deed itself is stated on the face of it to have been *indented, made, and concluded*. Where a charterparty, dated 6th of *February*, but averred not to be executed till the 15th of *March*, contained a covenant by the owner that the ship *should and would* proceed from *D.* where she *then* lay *on or before the 12th of* February, on her outward-bound voyage, and return, &c. and a covenant by the freighter that *in consideration of every thing above mentioned*, &c. he would pay certain freight for the voyage; the voyage being averred to be performed, and the freight earned, the owner may recover in an action of covenant, without averring that the ship sailed *on or before the 12th of* February; such covenant that the ship should sail *on or before the 12th of* February being either no condition precedent, but only an independent covenant, for breach of which the party had his remedy in damages, or not of the substance of the contract, which was for the performing of the voyage for which the ship was chartered, and earning the freight, or being rendered impossible to be performed by the parties themselves not having executed the deed till after the time appointed for doing the act, and thereby dispensing with the performance of it.

THE plaintiff declared, that whereas by a charter-party of affreightment, purporting to be *indented, made, and concluded* in *London* on the 6th of *February* 1801, between the plaintiff as owner of the ship *Argo, then lying* in the river *Thames*, and bound on a voyage to *Demerara*, on the one part, and the defendant and one *J. B.* of *London*, merchants, on the other part; but which charter-party was in fact *first indented, made, and concluded after* the said 6th of *February*, &c. and also *after the 12th of the same* February, to wit, *on the 15th of* March 1801; and not on the said 6th of *February*, or at any time before, or on the said 12th of *February* in that year; and was also in fact *sealed and delivered* by the plaintiff and defendant only, and not by the said *J. B.*; one part of which said charterparty sealed, &c. the plaintiff now brings here into court, *the date whereof is the said 6th of* February 1801; it was witnessed, that the said owner, for the considerations after mentioned, covenanted and agreed with the said freighters that the said ship *should and would* proceed from *Deptford*, where she *then* lay, on *or before the 12th day of the said* February to the port of rendezvous for the ships that were to join convoy for the *West Indies*, and *proceed* under convoy to *Demerara*; and on delivery of the cargo outwards, which was to be within ten days after arrival, she *should and would* receive on board from

the

1804.

HALL *against* CAZENOVE.

the agents of the freighters a full cargo, &c. and having received the ſame on board, ſhould therewith proceed from thence, after the expiration of the lay-days therein-after mentioned, to the place of rendezvous for the convoy for *England*, and having joined the fleet, ſhould ſail therewith for *London*, and there make true delivery of the cargo to the freighters, &c. And it was alſo in the ſaid charterparty alleged, that the ſaid owner did thereby covenant and agree with the ſaid freighters, *that the ſaid ſhip ſhould and would proceed on her intended voyage on or before the day before mentioned.* And the plaintiff, as ſuch owner of the ſhip, covenanted with the freighters that the ſhip ſhould lay at *Demerara* for unloading the outward, and loading the homeward cargo, 60 running days, (10 for unloading, and the remaining 50 only to be reckoned from unloading) and the uſual time for unloading on her return to *London*, &c.; *in conſideration whereof*, and of every thing therein above mentioned, the defendant covenanted and agreed that the ſaid freighters ſhould load, &c. in the port of *Demerara* within the time limited, and ſhould pay the freight, &c. in two months after reporting at the cuſtom-houſe at *London*. And the plaintiff thereby covenanted with the freighters that they might keep the ſhip on demurrage at *Demerara* 20 running days on the whole, on payment to the plaintiff of 10*l.* a-day for every day beyond the lay-days before mentioned. The plaintiff then averred that the ſhip did, *after the making* of the ſaid charterparty, viz. on *the* 15*th of* March in the year aforeſaid, *proceed from* Deptford *upon the ſaid voyage*, under and upon *the terms as by the charterparty*, &c. to the port of rendezvous for the ſhips that were to join convoy in the *Weſt Indies* with her outwardbound cargo, which had been ſhipped by the freighters, and afterwards proceeded un-

der

der convoy to *Demerara*, where ſhe arrived on the 29th of *May* following. That ſhe delivered her outwardbound cargo within 10 days after, and received a full homeward cargo from the agents of the freighters, and lay at *D.* 60 running days for the purpoſe of unloading and reloading, and that the freighters kept the ſhip on demurrage at *Demerara* above the lay-days in the charterparty mentioned, which demurrage amounted to 200*l.* That the ſhip afterwards joined convoy, &c, and on the 27th of *January* 1802 arrived at *London* with her homeward cargo, &c., and there ended the ſaid voyage, and the freight, &c. amounted to 1888*l.* 6*s.*; and then the plaintiff averred, that two months and upwards had elapſed from the time of reporting the ſhip at the cuſtom-houſe, and that though he had performed and been ready and willing to perform every thing in the charterparty contained on his part to be performed, *and which on his part and behalf could poſſibly be performed*, according to the tenor and effect, true intent and meaning, of the charterparty, yet the defendant did not, at the expiration of two months from ſuch report as aforeſaid of the ſhip's arrival, &c. or at any other time, pay to the plaintiff the ſaid ſums for freight, &c. and demurrage, but made default, &c.

1804.

HALL *against* CAZENOVE.

The defendant, by his plea, craved oyer of the charterparty, which was in theſe words:—This charterparty of affreightment, *indented, made, and concluded* in *London* this *6th day of* February 1801, between *J. H.* (the plaintiff) owner of the ſhip *Argo*, *now* lying in the river *Thames*, and bound on a voyage to *Demerara*, of the one part, and *C. T. C.* (the defendant) and *J. B.* &c. of the other part, witneſſeth, that the ſaid owner, for the conſiderations hereinafter mentioned, doth covenant, &c. with the ſaid freighters, &c. that the ſaid ſhip *ſhall and will proceed* from

1804. — HALL *against* CAZENOVE.

from *Deptford*, where ſhe *now* lies, *on or before the* 12*th of this preſent* February, to the port of rendezvous, &c. and *proceed* under convoy, &c. to *Demerara*, &c. and proceed *from thence*, &c. for *London* (as before ſet forth in the declaration), in witneſs whereof the parties have hereunto ſet *their hands and ſeals the day and year firſt above written:* and then the defendant demurred, and ſhewed for cauſes that it is not alleged, nor does it appear by the declaration, that the ſaid ſhip did proceed from *Deptford on or before the* 12*th of the ſaid* February in the charterparty mentioned to the place of rendezvous, &c.; nor that the charterparty was *firſt indented, made, and concluded after* the 6th of *February* 1801. But that it appears by the charterparty that the ſame was indented, made, and concluded *on* the ſaid 6th of *February* in the year aforeſaid; and that the plaintiff is by law eſtopped from making the ſaid allegation, &c. Joinder in demurrer.

Giles, in ſupport of the demurrer, after obſerving that the allegation in the declaration was not that the charterparty was *ſealed and delivered* after the date of it, which is the 6th of *February*, but the allegation was of the time when it was *indented, made, and concluded*, argued that the plaintiff was eſtopped from alleging that the charterparty was *indented, made, and concluded* after the 6th of *February*, when it appears upon the face of it as ſtated to have been *indented, made, and concluded on* the 6th of *February*. And though it be competent to a party to aver that a deed was *delivered* after the date, yet he cannot make any allegation inconſiſtent with the deed. *Goddard*'s caſe (*a*), *Bro. Abr. Obligation, pl.* 40. *Departure, pl.* 14. [Lord *Ellenborough* C. J. *Stone* v. *Bale* (*b*) is deciſive to ſhew that a

(*a*) 2 *Rep.* 4. *b.* (*b*) 3 *Lev.* 348.

party

1804.

HALL *against* CAZENOVE.

party may aver a delivery of a deed on another day than that on which it bears date.] The distinction taken is, that a party cannot aver a delivery on a day *prior* to the date. But if the plaintiff be not estopped from making the particular allegation in the declaration, as being equivalent to an averment of the day of delivery of the deed; then, 2dly, the deed must be considered as delivered on the 15*th of* March, in which case it is void upon the face of it; because it appears from the whole scope of it, that it was a condition precedent to the payment of freight, &c. that the ship should proceed from *Deptford*, where it is stated that she *then* (*i. e.* on the 6th of *February*) lay, *on or before the* 12*th of* February, to the port of rendezvous, &c. and proceed under convoy to *Demerara*. And the allegation that the deed was executed after the 12th will not supersede the necessity of alleging that a thing was done on the 12th, which by the terms of the deed is made a condition precedent. *Co. Lit.* 206.

Lawes contrà was stopped by the Court.

Lord ELLENBOROUGH C. J. First, as to the objection that the party is estopped from saying that the deed was *indented, made, and concluded* on a different day from that on which it bears date, I see nothing inconsistent with the deed in such an allegation, any more than if he had alleged that it was sealed and delivered on a day subsequent. It is quite unimportant when it was *indented*, and equally so when it was *made*, by which may be understood when it was *written*. Then the only material word is *concluded*, and a deed can only be said to be *concluded* when it is *delivered*. The time of delivery is the important time when it takes its effect as a deed; and the case

1804.

HALL against CAZENOVE.

of *Stone* v. *Bale* (a) is in point to ſhew that the delivery may be averred to be after the date. There is, therefore, no repugnancy in the allegation. Then, 2dly, it is objected that the failing on the 12th of *February* was a condition precedent, the performance of which was neceſſary to be alleged to entitle the plaintiff to recover. If it had been poſſible to have been performed at the time of the delivery, if the time itſelf had not then gone by, the inclination of my opinion at preſent is that it would have been a condition precedent. I do not, however, mean to give any opinion on that point. But here, when the deed was executed or concluded by the delivery, the ſtipulation, which was not impoſſible in its nature when the deed was firſt framed, had become impoſſible as between theſe parties from the time having paſſed. The ſtipulation, therefore, had then become wholly nugatory, and cannot be underſtood as having formed any part of the contract between the parties, without imputing to them the moſt manifeſt abſurdity. Then the reſt of the contract may take effect, which was proſpective at the time when the deed was concluded.

GROSE J. declared himſelf of the ſame opinion.

LAWRENCE J. Though the allegation here be not in exactly the ſame words as in *Goddard*'s caſe, yet it is the ſame in ſubſtance; and according to that caſe, though the deed appear on the face of it to have been made on one day, yet if in truth it were delivered on a ſubſequent day, that may be ſhewn by averment: and there is no more inconſiſtency in the one caſe than in the other. Then as to the ſecond objection; I doubt whether the failing on

(a) 3 *Lev.* 348.

or

1804.

HALL *against* CAZENOVE.

or before the 12th of *February* be a condition precedent on the part of the plaintiff to his recovery: it is a covenant that the ship *should* or *would*, &c. prospectively. But taking it, as my Lord has said, to be a condition precedent in the terms of it, yet having become, by the lapse of time, altogether impossible when the deed was executed, it could form no part of the agreement between the parties. But in construing instruments we must look to the substance of them in order to discover the meaning of the parties; and looking at the substance of this charterparty it is not unlike the case of *Constable* v. *Cloberie* (*a*), where the plaintiff covenanted in a charterparty that his ship should sail with the next wind upon a voyage to *Cadiz*; and the defendant covenanted that if the ship went the intended voyage and returned to the *Downs* that the plaintiff should have so much for the voyage. The defendant traversed that the ship sailed with the next wind; and upon demurrer the traverse was overruled: for the substance of the covenant was considered to be that the ship should perform the intended voyage, that being the primary intention of the parties, and not merely that she should sail with the next wind, which might change every hour. And that this was shewn by the covenant of the defendant, who was to pay so much for the freight; that is, for performing the voyage, and not merely for sailing with the next wind. So here the substance of the covenant is that the ship shall go to *Demerara* on freight and return again. I take this to be rather a case of mutual covenants than a condition precedent, and in that view the case of *Boone* v. *Eyre* (*b*)

(*a*) *Palm* 397.

(*b*) *B. R. E* 17 *G.* 3. 1 *H. Blac.* 273. n., and in *Campbell* v. *Jones*, 6 *Term Rep* 573.

1804. HALL *against* CAZENOVE.

is material to be attended to. That was, where the plaintiff had conveyed a plantation in the *West Indies*, with the negroes upon it, to the defendant, in consideration of an annuity to be paid him for his life; and covenanted that he had a good title to the land, and was lawfully possessed of the negroes, and that the defendant should quietly enjoy. And the defendant covenanted that the plaintiff, *well and truly performing all and every thing therein contained on his part* to be performed, he (the defendant) would pay the annuity. The breach assigned was the non-payment of the annuity. The defendant pleaded that the plaintiff was not at the time of making the deed legally possessed of the negroes on the plantation, and so had not a good title to convey. But it was holden that these were mutual covenants, and that where mutual covenants go only *to a part of the consideration* on both sides, where a breach may be paid for in damages, there the defendant has a remedy on his covenant, *and shall not plead it as a condition precedent.* According to this case, therefore, it would not have been a condition precedent to the plaintiff's recovering on the covenant for freight even if it had been possible for the ship to have sailed on or before the 12th of *February*, and she had not done so. And if the voyage has been performed, and the profit of it gained by the defendant, there can be no foundation for saying that the defendant shall not pay the freight for it; and he may recover damages for the not sailing in time, if any have been occasioned by it.

LE BLANC J. The substance of the pleadings shews that the charterparty was executed after the day on which it bears date, which, by all the authorities, the defendant is not estopped from doing. Then as to the other objection;

jection; if the defendant sustained any damage by reason of the ship's not having sailed on the particular day, he may recover it by bringing his action on the covenant; but, at any rate, the objection does not go to the plaintiff's right of action as on the ground of a condition precedent.

1804.
HALL *against* CAZENOVE.

Judgment for the plaintiff.

PLASKET, Executor of PLASKET, *against* HUGH BEEBY and MARY his Wife, SARAH THOMPSON, Widow, SARAH BEEBY, and JOSEPH COCKROX and ANN his Wife.

Friday, Feb. 3d.

THE plaintiff, as executor, &c. declared in debt against the defendants, describing the defendants *Mary* and *Ann* as the daughters and co-heiresses at law of one *Joseph Thompson*, deceased, and the said *Ann* and the defendants *H. Beeby*, *S. Thompson*, and *S. Beeby*, as devisees under the last will of the said *Joseph Thompson*, of certain lands, &c. whereof the said *Joseph Thompson* was seised in fee: for that whereas the said *Joseph Thompson* was indebted to the plaintiff's testator in 300*l.* upon bond, dated 10th of *April* 1801, for payment whereof the said *Joseph Thompson* bound himself and his heirs, executors, &c. to the testator, his executors, &c., yet the said *Jos. Thompson* in his lifetime, and the said defendants since, &c. have not, though requested, paid the same, &c.

An infant devisee sued by a specialty creditor of the devisor cannot pray the parol to demur by reason of his nonage, such privilege of an heir who is in by descent not being extended to a devisee by the stat. 3 *W. & M.* c. 14, which charges the land in his hands for the specialty debts of the devisor.

Demurrer of parol. And the said *Hugh*, and *Mary*, *Sarah Thompson*, *Joseph*, and *Ann*, by *T. Benson* their attorney, and the said *Sarah Beeby*, by *T. Beeby*, who is admitted by the Court of our said lord the king here to de-

1804.

PLASKET against BEEBY and Others.

fend for the fame S. B., she being within age, as guardian of the faid S. B. come and defend the wrong and injury when, &c. and fay that the fame *Sarah Beeby* is within the age of 21 years, namely, of the age of 18 years and 8 months and no more, to wit, at, &c. and this they are ready to verify; wherefore they do not fuppofe that during her minority fhe ought to anfwer the faid *T. Plasket* in his faid plea, &c., and pray that the faid parol may demur until the full age of her the faid *Sarah Beeby*, &c.

Demurrer. And the plaintiff, executor as aforefaid, fays that by reafon of any thing by them the defendants above in pleading alleged the faid parol ought not to demur nor to be delayed until the full age of the faid *Sarah Beeby*; becaufe the faid plaintiff, as executor as aforefaid, fays that the faid plea of them, the defendants, is not fufficient in law to preclude them from anfwering the faid plaintiff, &c, nor that the faid parol fhould demur till the full age of the faid *S. B.*; to which faid plea, &c. he the faid plaintiff, &c. is not bound by law to anfwer, &c Joinder in demurrer.

Walker, in fupport of the demurrer, made two points; 1ft, Whether the infant devifee, fued on a bond of the teftator, can claim the privilege that the parol fhall demur till fhe come of age? 2d, Whether the other defendants can avail themfelves of the infant's privilege, if any? 1ft. The queftion arifes upon the ftat. 3 *W. & M. c.* 14. which was made "for the relief of creditors againft fraudulent devifes," and makes the land of the teftator and obligor chargeable in the hands of the devifee, as it would have been had the fame defcended to the heir. This, therefore, being a remedial ftatute, is to be conftrued moft beneficially in furtherance of the object of the Legiflature;

1804.

PLASKET *against* BRADY and Others.

giſlature; which was not to benefit the deviſee, but to charge him, in reſpect of the real aſſets, deviſed to him, in favour of the teſtator's ſpecialty creditors. There is no direct proviſion in the act for extending to an infant deviſee the ſame privilege which an infant heir has of claiming the parol to demur: and to extend the act ſo far by implication would be to delay the object of the Legiſlature, and in ſome reſpect to defeat it; for the intereſt of the debt might accumulate in the mean time beyond the value of the eſtate, and the deviſee would have all the benefit of it in the mean time. Whereas the very firſt proviſion of the act (ſ. 2.) is to make void all deviſes as againſt ſpecialty creditors. The caſe of an heir differs from that of a deviſee; for the one is originally bound by the deed, and is primâ facie entitled to the land, and he can only diſcharge himſelf for want of aſſets by deſcent; but the other is only bound in reſpect of the eſtate, and has no claim to it till after the ſpecialty debts of the teſtator are ſatisfied. There is, therefore, no reaſon for extending any ſuch privilege to him by implication. Beſides, there is a diſtinction even as to the heir's privilege where he has the eſtate by deſcent or by grant; if by grant, which is moſt like the preſent caſe, he cannot claim the parol to demur for nonage; *Waller* v. *Lambe* (*a*); nor where he takes only as ſpecial occupant, *Chaplin* v. *Chaplin* (*b*). And in other inſtances the Legiſlature have interfered to reſtrain, but never to enlarge the privilege of nonage in this reſpect; as in 3 *Ed.* 1. *c.* 47. 6 *Ed.* 1. *c.* 2. 13 *Ed.* 1. *ſt.* 1. *c.* 40. and 52 *H.* 3. *c.* 60. But, 2dly, at any rate, as a deviſee is only entitled to the eſtate con-

(*a*) *Dy.* 321 *b.* and 1 *And.* 21. and *v de Co. Lit.* 239 *a* and 1 *Danv. Abr* 263. G.

(*b*) 3 *P. Wms.* 368.

1804. PLASKET *against* BERRY and Others.

ditionally on payment of debts, in lieu of the heir, the privilege would at all events determine when the heir was of age; and therefore an infant devisee sued with an adult heir must lose his privilege: or at least the other defendants should not have joined with the infant devisee in praying the parol to demur as to all. *Ast. Plac.* 241. *Brown. Red.* 195.

Richardson contrà. The devisee is placed by the statute in the same situation of responsibility as the heir at common law, and is entitled to the same privilege. And it is clear that an infant heir may plead his nonage and pray the parol to demur. So where there were several heirs at common law, and one an infant, the parol would demur as to all, because as all were to contribute, it would have been hard that the adults should plead and have judgment and execution against them when they could not have contribution from the infant. *Com. Dig. Pleader*, 2 E 3. cites *Aston's Entr.* 241. and *Brownl. Red.* 195., which appears to be the same precedent. In *Co. Litt.* 290. *a.* it is said, "if a man have judgment against him for debt, &c., and dieth, his heir within age, *or having two daughters and the one within age*, no execution shall be sued of the lands by elegit during the minority, although the heir be not specially bound, but charged as terre-tenant." And *Herbert's* case (*a*) is express to the same purpose; and *Langeford's* case, *Lib. Ass. Anno.* 29. *pl.* 37. (*b*), that where an heir within age is sued with adults, the latter may join with the infant in praying that the parol may demur against all. If, however,

(*a*) 3 *Rep* 13 *a.*

(*b*) Vide *Bro. Abr Parol Demur pl* 16 *Bro. Age, pl* 36. *Fitz Abr Age, pl* 73. and *Ilet* 59.

there

1804.

PLUNKET *against* BIRBY and Others.

there were any objection to the form of pleading that the parol should demur, that should have been stated as special ground of demurrer. The only question then is, Whether the stat. 3 *W.* & *M. c.* 14. meant to throw on the devisee a greater degree of responsibility than the heir had at common law, when the devisee was not originally liable at all; and no reason can be urged why he should not be put upon the same footing, as it seems to have been the intention of the Legislature, to do, upon comparing the different parts of the act. The inconvenience recited in the preamble is, that persons having specialty debts which bound their *heirs* have devised away their lands, &c. in fraud of their creditors; and then it provides a remedy commensurate with but not exceeding the mischief, by making void such devises only as against such creditors; leaving them, therefore, by necessary implication in the same condition as if the lands had descended to the heirs of the debtors. It does not profess to give the lands to the creditors in the first instance, leaving the surplus only to go over to the devisees. If the statute had merely avoided the devise altogether, this objection could not have arisen; but it only avoids it as against creditors; the effect of which is to let in the same liability as in case of intestacy, and no more; and then, by s. 3. it gives every creditor an action against the devisee jointly with the heir; and treats both heir and devisee so much on the same footing as to provide that a devisee for false pleading or not confessing assets shall be liable and chargeable *in the same manner* as an heir. The 4th section contains an exception in favour of devises for payment of debts and portions in pursuance of marriage contracts. S. 5. is particularly levelled against heirs who alien the land before process can be sued out against them, and directs that

4 they

1804.

PLASKET against BEEBY and Others.

they shall be answerable *de bonis propriis* to the value of the land aliened; but such land bonâ fide purchased before action brought is exonerated. And s. 7, directs that in case the heir pleads, and issue be joined on riens per descent, the jury shall inquire of the value, &c. Then the 7th and last section provides that every devisee made liable by the act "shall be liable and chargeable *in the same manner* as the heir at law, by force of this act, notwithstanding the lands, &c. to him devised, shall be aliened before action brought." The whole scope, therefore, of the act is to put heirs and devisees on the same footing with respect to specialty creditors: and so it was considered by the Court of Exchequer in *Matthews* v. *Jones and others* (a); where lands aliened by a devisee before suit brought by a creditor of the testator were considered to be protected in the hands of the alienee as much as in case of alienation by the heir; and yet there is no express provision made in the statute to protect the alienee of the devisee as there is the alienee of the heir.

Walker, in reply, said, that if the other defendants, besides the infant, had no right to the privilege prayed, the objection went to the substance and not to the form of the prayer as pleaded by all jointly. That the privilege itself was not founded in reason, and therefore the extension of it was not to be favoured by intendment. That the law so far favoured the heir beyond the devisee, that the estate, if undevised, descended to the heir entire, though liable in his hands for the debts of his ancestor; but by the statute the devisee as against creditors took no estate at all till after payment of debts. That it was no

(a) 2 *Anstr.* 506, and *vide Gott* v. *Atkinson*, *Willes*, 524.

where directed generally in the act, that the devisee should only be charged *in the same manner* as the heir, but always with reference to some particular provision, as by s. 3. with respect to false pleading, and by s. 7. with respect to alienations before action brought.

1804.

PLASKET *against* BEEBY and Others.

Lord ELLENBOROUGH C. J. This case depends on the construction of the statute 3 *W.* & *M.* c. 14. Before that act the devisee of the realty was not liable at all for the specialty debts of his devisor, and now he is only liable to the extent to which the statute has made him; but to that extent he is liable, and is not entitled to any other privilege than what is expressly given to him by the statute: and that is silent with respect to the privilege now claimed of pleading his nonage in stay of the creditor's action. The privilege of the heir himself in this respect is anomalous, and confined to the heir alone. It is not necessary upon this occasion to enter into the history of it further than to observe, that the privilege given to the infant heir, to make the parol demur till he was of full age, was not merely on account of his inability to defend himself by reason of his infancy, but from an absolute deficiency of funds arising out of the nature of the feudal tenures. For during the subsistence of wardships, the estate of the heir in chivalry was, during his minority, in the hands of the guardian in chivalry, who had the whole profits of it. How the privilege came to be extended at common law to other heirs is lost in antiquity. It is enough to say, that it is an anomaly in the law, and confined to heirs; and not having been communicated by the statute of *W.* & *M.* to the devisee in whose hands the real property of the testator is made chargeable, the devisee must be liable notwithstanding his nonage, and cannot bring to himself,

1804.

PLASKET *against* BEEBY and Others.

felf, aliundé the ftatute, a peculiar privilege given to the heir by the common law. The plea therefore is ill pleaded, and no anfwer to the declaration.

GROSE J. The obfervation made on the general provifion of the ftatute is very material. The Legiflature have, in the firft inftance, evidently made the real eftate of the teftator liable, in the hands of the devifee, to fpecialty creditors: and where they meant any exception they have introduced it in other parts of the act. Then if they had meant to engraft alfo the qualification now contended for, they would have done fo: but that being omitted, we cannot fupply it.

LAWRENCE J. The ftatute has, by the 2d fection, made the devifee liable in refpect of the land devifed for the fpecialty debts of his teftator, for which the heir was before liable if the lands had defcended to him. Then by f. 3. it has given an action to the fpecialty creditor againft the devifee jointly with the heir, and has made fuch devifee liable for a falfe plea, &c. in the fame manner as the heir would have been. The 4th fection contains an exception of devifes for certain purpofes therein named. The 6th regards merely the heir. And fections 5 and 7. provide that the heir, to whom lands defcend, fhall, if he aliene before action brought by a fpecialty creditor, be liable, notwithftanding, to the value of the land; and that "Every devifee made liable by this act fhall be chargeable in the fame manner as the heir by force of this act, "notwithftanding the lands, &c. to him devifed fhall be "aliened before the action brought," &c. But no where in the act is the privilege of making the parol demur for nonage given to the devifee: and there is no cafe in the books

books which gives it to any other than an heir at law. The reason of this privilege having been given to the heir is stated by Lord C. B. *Gilbert*, in his *History of the Common Pleas*, pages 54 and 56. This dilatory plea, or temporary bar, whereby the parol is to demur till full age is, he observes, "peculiar to the feudal law; for in the civil "law the guardian was party to the suit instead of the "infant; and if there were mala fides in his defence he "was to answer it to the infant. But the wardship in "the feudal law was of another nature; for the guardian "had the whole profits of the estate, and also the mar- "riage of the infant, which was in order to breed him up "to arms, and to marry to such person as they thought "might continue the martial strain, that so the ward "might subserve the original design of the tenure." Again; "In all cases on the fee, as if an action of debt "on the obligation of the ancestor be brought against the "heir, there the parol shall demur; because that lays a "burthen on the fee, which by the law was to be pre- "served intire till the infant came of age, since the profit "was given away during his nonage to the lord." If that were the reason for granting the privilege originally, it is extraordinary how it came to be extended to the heirs of lands holden in soccage. However, it has been so decided: but certainly it has never been extended to devisees; and before the statute of *W. & M.* was passed the feudal tenures, and with them wardships, had been abolished. And surely there can be no reason for giving this privilege now for the first time; for there can be no convenience or justice in extending to devisees the privilege of a plea merely to delay creditors.

1804.

PLASKET *against* BEEBY and Others.

La

1804.

PLASKET against BEEBY and Others.

Le Blanc J. The privilege has always been confined to infant *heirs* to whom lands have come by descent from the specialty debtor: and if it be not expressly given to devisees by the statute, there is no reason for extending it to them by implication. According to the cases cited, even the heir taking by grant or purchase is not entitled to it; which is most in point to the situation of a devisee. The claim, then, must rest entirely on the construction put upon the statute of *W.* & *M.*, where the intention of the Legislature was to prevent frauds against specialty creditors by their debtors devising their estates to persons in whose hands they were not liable for the payment of debts. It is not pretended that the privilege is given in terms to the devisee. But if it were necessary, in order to further the intention of the Legislature, to give him his dilatory plea, there might be more colour for the argument. But instead of furthering, it would tend to defeat the object in view, which was the relief of creditors, by enabling devisors, by means of devises to infants, to delay for a time the suits of their creditors for the recovery of their just debts. Then the reason for this privilege, even in the case of heirs, having long ago ceased, there is no pretence for extending it, without the plain direction of the Legislature, to devisees.

Judgment for the Plaintiff.

1804.

WALKER *against* WRIGHT.

Saturday, Feb 4th.

Where the cause of action partly arose in *Derbyshire* and partly in *Ireland*, the Court refused to change the venue from *London* to *Derby* on an affidavit that the cause of action arose in *D* and *I*, and not in *London* or elsewhere than in *D* and *I*.

BALGUY moved to change the venue from *London* to *Derbyshire* in an action on the case for non-performance of a contract made in *Derbyshire*, for the labour of a servant to be employed in mines in *Ireland*, and for money paid. This was grounded upon an affidavit, stating that the cause of action arose in the county of *Derby and in* Ireland, and not in *London* or elsewhere than in the said county of *Derby and in* Ireland. And he cited *Metcalfe* v. *Markham* (*a*), where the venue in an action for a libel, contained in a letter written in *Yorkshire* and sent by the post into *Germany*, was changed from *London* to *Yorkshire* upon the usual affidavit. But

Per Curiam. There the whole cause of action arose in *Yorkshire*, where there was a publication of the libel. But here the cause of action partly arises in *Ireland*, where the contract was to be executed. The party, therefore, cannot make the usual affidavit, that *the cause* of action arose in *Derbyshire* and not elsewhere. And here he does not take the case out of the usual rule by shewing any particular convenience in having the cause tried at *Derby* rather than in *London*, as by all the witnesses residing in *Derbyshire*. And as most of the witnesses must probably come from *Ireland*, it may be even more convenient to try the cause in *London*.

Rule refused.

(*a*) 3 *Term Rep.* 652.

Saturday, Feb. 4th.

GOODTITLE, on the Demise of PADDY, Widow, and Others, *against* MADDERN.

A devise of "all the rest I have in the world, both houses, lands, goods and chattels, &c to my wife, my executrix, *so that* she shall sell my stock in trade and household goods, and if these will not pay the debts she shall sell next the house of fee in *Penzance*, &c. *so that* my executrix shall pay in good time all lawful *debts*," &c.: held to carry the fee of the house in P to the executrix, she being charged personally with the payment of debts, in respect of the real as well as personal estate devised. And the postponement of the sale of the realty till after the personal estate was exhausted being merely recommendatory to her.

EJECTMENT for a messuage at *Penzance* in the county of *Cornwall*, tried before *Graham* B. at the last assizes at *Bodmin*. The lessors of the plaintiff were the heirs at law of one *Joseph Pascoe*, who was seised in fee of a messuage and premises in *Penzance*, and of another estate in *Prospednick*, and of certain personal chattels; and by his will, dated 9th of *January* 1767, duly executed and attested to pass real estate, after certain introductory words declaring "his intent to settle his affairs, or the little that God had blessed him with in the world, so as to prevent any difference amongst his family and friends after his decease touching the same;" and after bequeathing to his three sisters (then his heirs at law, through whom the lessors of the plaintiff claimed) two guineas each for a mourning suit, and giving other trifling legacies to others of his relations and friends; devised as follows: "All the rest I have in the world, both houses, lands, goods and chattels, stock in trade, and all other things that belong or may belong to me, I give to my present wife *Joan Pascoe*, my executrix, *so that* she shall sell my stock in trade, and household goods; and if these will not pay the debts, she shall sell next *the house of fee in* Penzance, and not *Prospednick*; *so that* my executrix shall pay in good time all lawful debts that shall appear." The testator died in 1768, leaving his widow and executrix and his three sisters him surviving. On his death the executrix entered on the house in *Penzance*, and took possession of the rest of the testator's property and effects.

And

1804.

GOODTITLE *against* MADDERN.

And it was admitted that the perfonal eftate, which came to her as executrix was more than fufficient for the payment of the legacies, debts, and funeral expences of the teftator. It was objected at the trial, on the part of the defendant, who claimed under the widow and executrix, that fhe took a beneficial intereft in fee in the houfe at *Penzance*: or if not, that at leaft the direction to fell imported a legal eftate in fee. And the learned judge was of opinion with the defendant at all events on the latter ground; it not appearing that all the debts were paid: and though that might be prefumed from length of time, yet they might have been paid by her out of her own funds, in which cafe fhe would have a right to hold the eftate till fhe was reimburfed; and therefore he directed a nonfuit.

Gibbs and *Burrough* now fhewed caufe againft a rule nifi for fetting afide the nonfuit, &c.; and faid that it was fufficient for the purpofe of defeating this ejectment that *Jane Pafcoe*, the widow and executrix, took the legal eftate in fee as a truftee for the payment of debts; for it was all given to her by the teftator, "fo that fhe fhould in good time pay all lawful debts." And it is clearly fettled that if the purpofes of the truft require that the truftee fhould take the fee, it will pafs, though there be no words of inheritance. And they cited *Doe* d. *Beazley* v. *Woodhoufe* (*a*). They alfo argued fhortly, from the words of the will, that the devifor intended to pafs the fee to his widow, as well from the introductory part, fhewing an intention to difpofe of his whole property, like as in *Loveacres* v. *Blight* (*b*), as from the legacies given to the heirs at law; which diftinguifhed this cafe from that of *Doe* d. *Mellor* v. *Bar-*

(*a*) 4 *Term Rep.* 89. (*b*) *Cowp.* 355.

1804.

GOODTITLE *against* MADDERN.

ber (a), where too the residuary devise to *S. C.*, which was holden to carry only an estate for life, was "*after* payment of debts," &c.

Jekyll and *Dampier*, in support of the rule, relied on the last mentioned case, where the residuary devise was "all the rest of my lands, tenements, and hereditaments, either freehold or copyhold whatsoever and wheresoever, and also all my goods, chattels, and personal estate, of what nature or kind soever, after payment of my just debts and funeral expences, I give, devise, and bequeath the same to my wife *S. C.*," whom he thereby nominated sole executrix. The Court there held that the wife took for life only; and that judgment was ultimately affirmed in the House of Lords: and yet she was there charged with the payment of the debts as well as here. They also contended that the charge of debts here was only contingent upon the *real* estate, on failure of the personalty, which was admitted to be sufficient; and referred to *Merson* v. *Blackmore* (b), where also the residuary devise was of all the testator's lands, &c. after debts and legacies paid to *J. M.*: but though there were introductory words, shewing the devisor's intent to dispose of the whole, yet it was decreed that the devisee took only for life: and the Master of the Rolls relied on the circumstance that the debts were only a contingent charge on the *real* estate if the personal estate should prove deficient.

Lord ELLENBOROUGH C. J. It is clear that the executrix and residuary devisee took a fee in the premises in question; for she is charged with payment of all the debts,

(a) 5 *Term Rep.* 538, 6 vol. 175., and 1 *Bos. & Pull.* 558.
(b) 2 *Atk.* 341.

and

1804.

GOODTITLE *against* MADDERN.

and she has the land devised to her as well as the personal estate, all in the same clause, in order to enable her to satisfy that charge. And she cannot have less than a fee in it, because she is empowered to sell it, which she cannot do without having the fee. As to what is said in the will relative to the sale of the stock in trade and household goods, in the first instance, for payment of debts, and if those were not sufficient, then the house in *Penzance*; that is merely directory to her to apply the personalty first for payment of debts before the realty, which is no more than what the law directs in the common case. The distinction has turned in all the cases on this, whether the debts, &c. were merely a charge on the estate devised, or a charge on the devisee himself in respect of such estate in his hands. In *Doe* v. *Richards* (*a*) the devise was of all the residue of the devisor's land, &c. and personal estate, his legacies and funeral expences being *thereout* paid: that was holden to convey the fee, becauseit was considered as a charge on the devisee in respect of the estate in his hands. But in *Denn d. Moor* v. *Mellor* (*b*), where the devise of the residue of lands and goods, &c. was, "*after* payment of debts, &c." only an estate for life passed; for there the debts were no charge on the executrix and residuary legatee, because she was only to have the estate *after* those charges were satisfied. The subject was much considered in that case, which came on again in this Court upon a special verdict (*c*), and was afterwards carried to the House of Lords (*d*), where, after much discussion, the judgment of this Court, which had been reversed in the Exchequer-chamber, was finally affirmed, upon the distinction I have mentioned, that

(*a*) 3 *Term Rep.* 356. (*b*) 5 *Term Rep.* 558.
(*c*) 6 *Term Rep.* 175. (*d*) 2 *Bos. & Pull.* 247.

 where

1804.

Goodtitle *againſt* Maddern.

where the deviſe is only *after* payment of debts, there the charge is upon the *land*, and the deviſee himſelf takes nothing till after that charge is ſatisfied: but where the deviſee himſelf is charged with the payment of the debts, there he muſt take the fee in the eſtate in reſpect of which he is ſo charged. For, otherwiſe, as Lord *Kenyon* obſerved in *Doe d. Willey* v. *Holmes* (*a*), the deviſee, who by taking the eſtate is bound to pay the debts and legacies at all events, might be a loſer by the deviſe; as the rents and profits during his life might not be ſufficient to reimburſe him. And there the deviſe, which was of a freehold houſe and furniture, to *Elizabeth Gibſon*, who was alſo made executrix, *ſhe paying all juſt debts, legacies*, &c. was adjudged to paſs a fee.

Grose J. The rule has been long eſtabliſhed, that if the executor be bound to pay the debts by the terms of the deviſe, he muſt take a fee in the lands deviſed to him in reſpect of which ſuch obligation is thrown upon him: but if he be only to pay them out of the produce of the land deviſed to him, or only to take the land *after* payment of debts, there, without words of inheritance, the fee will not paſs. Now here the deviſe to the executrix is "ſo "that ſhe ſhall pay in good time all lawful debts that "ſhall appear." That makes her liable at all events to pay the debts, and not merely out of the rents and profits; and, therefore, by all the authorities ſhe muſt take the fee.

Lawrence J. It is ſettled by a great variety of caſes, that where the charge is on the perſon to whom the land

(*a*) 8 *Term Rep.* 1.

is

is devifed, there he muft take the fee: but not where the charge is upon the land devifed, and payable out of it. And the reafon given why in the former cafe the devifee muft take the fee is, becaufe otherwife the eftate may not be fufficient to pay the charge during the life of the devifee, which would make him a lofer, and that could not have been the intention of the devifor. Now here I take it that the debts were meant to be a charge upon the executrix and devifee. The devife of both the realty and perfonalty is made to her, "*fo that fhe pay all lawful debts,*" &c. But having given her both, the devifor recommends to her to part with the perfonalty firft, before the houfe, in fatisfaction of the debts. But fhe had the fame power over both.

1804.

GOODTITLE *againft* MADDERN.

LE BLANC J. The diftinction is well fettled between the effect of a charge on the perfon of the devifee, and a charge on the eftate devifed. The one carries the fee, the other does not. Now by tranfpofing the words of the the devife, which may fairly be done, the intention of the devifor to fix the charge on the perfon of his executrix will be very apparent. The devife will then run thus: "My executrix fhall pay in good time all lawful debts that fhall appear." And in order to enable her to pay all my debts, "I give her all I have in the world, both houfes, lands, goods," &c. But I recommend to her for payment of the debts "to fell my ftock in trade," &c. firft, and "next the houfe of fee in *Penzance*, and not *Profpednick*." But if the perfonalty had not proved fufficient to pay the debts, no doubt that the houfe at *Penzance* muft have been fold, becaufe the debts were charged on that as well as on the reft in her hands.

Rule difcharged.

1804.

Monday, Feb. 6th.

LE BRET *against* PAPILLON.

No matter of defence arising after action brought can properly be pleaded in bar of the action generally, but it ought to be pleaded in bar of the further maintenance of the suit. Therefore where one who was an alien *amy* at the time of the action brought became an alien enemy before plea pleaded, and the defendant pleaded that the plaintiff ought not *to have or maintain* his action, because he was before *and at the time of exhibiting his bill*, and that he *now* is an *alien enemy*, &c. concluding that therefore the plaintiff ought to be barred from *having or maintaining* his action, &c. To which the plaintiff replied that *at the time of exhibiting his bill* he was an *alien amy*; wherefore he *prayed judgment and his damages*. To which there was a demurrer. Held that the plea was ill pleaded. But yet, as the Court were ex officio bound to give such judgment as appeared upon the whole record to be proper, without regard to the issues found or confessed, or to any imperfection in the prayer of judgment on either side; and as it appeared upon the whole that the plaintiff was now an alien enemy, and therefore incapable of maintaining further his suit, judgment was given that he *be barred from* FURTHER *having or maintaining his action*.

THE plaintiff brought assumpsit against the defendant upon a certain judgment recovered by the plaintiff against the defendant, in the Court at *Rouen* in *France*, and upon the common money counts. Pleas, 1st, non-assumpsit; 2dly, that the plaintiff ought not *to have or maintain* his aforesaid action against the defendant, because the plaintiff is an *alien* born in foreign parts, viz. at *Rouen* in *France*, out of the allegiance of our sovereign lord the king, and within the allegiance of a foreign sovereign, to wit, the *French* king, and that the plaintiff, before *and at the time* of exhibiting his bill in this behalf, was and *now is inhabiting and commorant in* France, viz. at *Rouen*, &c. under the government of the persons exercising the powers of government in *France*, between whom and our said lord the king a *public war* has been commenced and is *now carried on*; and that the plaintiff is an enemy of our said lord the king, and adhering to the king's enemies, to wit, at *L.*, &c. and this the defendant is ready to verify; wherefore he prays judgment if the plaintiff ought *to have or maintain* his aforesaid action against him the defendant in this behalf, &c. The plaintiff, by his replication, says, that he ought not, by reason of any thing in that plea alleged, to be barred *from having and maintaining* his action against the defendant, because he says that he ex-

hibited

1804.

LE BRET *against* PAPILLON.

hibited his bill against the defendant in this behalf long before *Wednesday* next after five weeks from the day of *Easter* in *Easter* term 43 *G.* 3., viz. on *Wednesday* next after fifteen days from the day of *Easter* in *Easter* term 43 *G.* 3. And that *at the time of the exhibiting of his said bill* against the defendant and afterwards, as well he, the plaintiff, as the said persons then exercising the powers of government in *France*, were *at peace and in amity with our said lord the now king* and his subjects, to wit, at *L.*, &c. And this the plaintiff is ready to verify; wherefore *he prays judgment and his damages* aforesaid to be adjudged to him, &c. To this the defendant demurred, and assigned for causes, that the plaintiff has, by his replication, professed to answer the whole of the defendant's plea, whereas he has not confessed and avoided or traversed and denied the whole of the plea, inasmuch as the defendant has by his plea averred that the plaintiff, at the time of pleading the said plea, was an alien born in foreign parts out of the allegiance, &c. and was *then* inhabiting and commorant in *France*, &c. between whom and the king, &c. there was *then* a public war commenced and carrying on, and that the plaintiff *then* was an enemy of the king, &c.; which said several matters the plaintiff has not answered, but attempted to put in issue that *at the time of exhibiting* the bill of the plaintiff against the defendant, as well the plaintiff as the said persons then exercising the powers of government in *France* were at peace and in amity with the king and his subjects, to which said *time* in the replication no part of the defendant's plea applied, &c. Joinder in demurrer.

Espinasse in support of the demurrer. If any material part of the plea be left unanswered by the replication the

1804.

LE BRET *against* PAPILLON.

latter is bad. 5 *Com. Dig.* 87. *Pleader*, F. 4. Then as the plea imports a prefent difability in the plaintiff to have and maintain his action, according to *Brandon* v. *Nefbitt* (*a*), by fhewing him to be now an alien enemy adhering to and commorant in the enemy's country, it is no anfwer to fay that he was an alien amy at the time of exhibiting his bill. [Lord *Ellenborough*. The only queftion is, Whether as the plaintiff was in a capacity to fue at the time of exhibiting his bill, and his incapacity has fince arifen, you ought not, inftead of praying judgment by your plea if the plaintiff ought *to have or maintain* his action, &c. to have prayed judgment if he fhould *further maintain* his action upon the fubfequent difability, as in nature of a plea *puis darrein continuance?*] If any matter of difability arife between the commencement of the action and plea pleaded, it may be pleaded in bar as a plea in chief: if it arife *after* plea pleaded, then it muft be pleaded as a plea *puis darrein continuance*. As in *Price* v. *Kenrick* (*b*), where a releafe by the plaintiff after action brought and imparlance was pleaded in bar, [Lord *Ellenborough* C. J. A matter may be pleaded in bar, and yet go only to the *further continuance*, and not to the commencement of the action.] In *Moor* v. *Green* (*c*), outlawry between action brought and plea pleaded was deemed not neceffary to be pleaded *puis darrein continuance;* but in bar to the action in chief; and it was compared to the common cafe of a judgment confeffed by an executor after action brought and before plea pleaded, which is never pleaded *puis darrein continuance*, but in chief. Then the replication is at any rate ill, becaufe it

(*a*) 6 *Term Rep.* 23. Vide *Cafferes* v. *Bell*, 8 *Term Rep.* 166. as to the form of the plea of alienage.

(*b*) *Fortef.* 338. (*c*) *Salk.* 178.

admits

admits that the plaintiff is now an alien enemy, and yet it prays that he may recover damages.

1804.

LE BRET *against* PAPILLON.

Lambe contrà contended, that the action, having been well commenced, cannot be defeated by an act arising since, when the plea goes in bar of the action itself, and not merely to the further continuance of it. The bar of alien enemy is merely a temporary, and not a perpetual bar; it is only "*donec terræ fuerint communes,*" that is until both nations be in peace. *Co. Lit.* 129. *b.* Now here it is pleaded as a perpetual bar, which cannot be supported by any precedent. Outlawry indeed may be pleaded either in abatement or in bar (*a*), *Cliff's Entr.* 3, 4. But when the outlawry is reversed, the disability is removed. This is very distinguishable from the case cited of a release, which is a perpetual bar. Then if the plea be bad there is no answer to the plaintiff's action on the record.

Espinasse in reply referred to the rule laid down in *Sullivan* v. *Montague* (*b*), that *actio non* goes in every case to *the time of pleading*, not to *the commencement of the action.*

Lord ELLENBOROUGH C. J. said that that had never been cited as law, at least since the case of *Evans* v. *Prosser* (*c*). But he observed, that however ill pleaded the plea might be, yet as it appeared from the whole record that the plaintiff was now an alien enemy, he had great difficulty in saying that the plaintiff could have judgment to recover: and therefore directed the matter to stand over for further

(*a*) *Vide* the distinction taken in *Co Lit.* 128. *b.*, where outlawry is pleadable in bar of the action or only in disability of the person.

(*b*) *Dougl* 112. (*c*) *Evans* v. *Prosser*, 3 *Term Rep.* 188.

1804. further confideration. And on a fubfequent day his Lordfhip delivered the judgment of the Court.

LE BRET *against* PAPILLON.

This is an action of affumpfit, brought upon a foreign judgment, recovered by the plaintiff againft the defendant in a court at *Rouen* in *Normandy*. The defendant pleads, firft, the general iffue; and, 2dly, that the plaintiff is an alien enemy born in foreign parts, and under the allegiance of a foreign fovereign, viz. the king of *France*, and is now inhabiting and commorant in *France* under the government of the perfons exercifing the powers of government in *France*, between whom and our king a war is commenced and now carried on; and that the plaintiff is an enemy of the king. To this the plaintiff replies, ftating the time when he exhibited his bill, that as well he as the perfons exercifing the powers of government in *France* were then at peace and in amity with our king and his fubjects. To this replication there is a demurrer with fpecial caufes affigned. It appears upon the whole of this record, that though the plaintiff be now an alien enemy, yet that he was not fuch at the time of exhibiting his bill: and the queftion is, Whether the plea of the defendant, pleaded as it is generally in bar of the action, be good; or whether, inafmuch as a right to fue was well vefted in the plaintiff at the time of action brought, it ought not to have been pleaded in the form in which pleas after the laft continuance are generally pleaded, viz. That the plaintiff ought not *further* to have or maintain his action? And, indeed, according to what is faid in *Lutw.* 1143. *Campion* v. *Barker*, (in which *Raftell Appels en Mort* 4. & *det. en Relafe* 7. are referred to), "*this feems to be the proper way of* "*pleading a collateral thing, which happens after the action* "*brought; for by this it admits that the action was well* "*brought,*

" *brought, but that the plaintiff, by reason of the new mat-* 1804.
" *ter, ought not to proceed further in it.*" This report refers to a subsequent case, 2 *Lutw.* 1177. *Rainbow* v. *Worrall and others*, in which case it does not, however, appear whether any judgment were ultimately given. And it is urged that *outlawry* pending the writ may, on the authority of *Moor* v. *Green*, *Salk.* 338., and a *release*, on the authority of *Price* v. *Kenrick*, *Fortes.* 338., be pleaded generally in bar of the action. And the case of *Sullivan* v. *Montague*, *Dougl.* 106., was cited, where it was holden that matter of defence arising after action brought may be given in evidence on the general issue, if it happen before plea pleaded: to which might be added the case of *Reynolds* v. *Beerling*, *Mich.* 25 *G.* 3. *B. R.*, which is to be found in the notes to the case of *Evans* v. *Prosser*, 3 *T. R.* 186., and where it was holden, on the authority of *Sullivan* v. *Montague*, that a judgment recovered by the defendant against the plaintiff, after action brought, and before plea pleaded, might be pleaded in bar of such action. However, in the subsequent case of *Evans* and *Prosser*, in 3 *T. R.* 186., it was holden that a plea of set-off, in which it was pleaded that the plaintiff, before and at the time of the plea pleaded, was indebted, was bad on general demurrer; and the point determined in *Reynolds* v. *Beerling*, in favour of a set-off, the matter of which arose after action brought, was considered as not capable of being supported. Since that time, therefore, it may be considered as a settled rule of pleading, that no matter of defence *arising after action brought can properly be pleaded in bar of the action generally.* It has been suggested that pleas of judgment recovered, pleaded by executors, where judgments have been confessed after action brought, are pleaded generally in bar of the action, and not with an ulterius

LE BRET *against* PAPILLON.

manu-

1804.

LE BRET *against* PAPILLON.

manutenere non debet plea, after the last continuance pleaded: but that is an action of a peculiar nature; the action is there brought against the executor, not only on the foundation of a debt due from the testator to the plaintiff, but in respect also of assets supposed to be in his, the executor's, hands liable to its satisfaction; and the executor has by law a power of confessing a judgment to another creditor in preference to the plaintiff in the suit first brought, and thereby to the extent of the assets then in hand to create a perpetual bar to the plaintiff's suit, the same being pleaded in the usual way, viz. that he has not assets except so much, which are not sufficient to satisfy that judgment. But the plaintiff may, and constantly does, avoid the effect of the plea as an absolute bar, and protect himself from costs at the same time, on the ground of his original right of suit, by praying judgment of such assets as should come to the executor's hands after satisfying the judgment so confessed. So that the plea of judgment recovered against the defendant as executor pending the writ enures in point of effect, if the judgment itself be not questioned by the replication, as only a plea in bar of the further maintenance of the suit against the executor in respect of his present assets. It is also urged on the part of the defendant, that even if the plea be bad as pleaded in bar generally, yet that the replication is bad in praying a judgment for damages, which cannot be given in favour of this plaintiff, inasmuch as he appears by the record to be *now an alien enemy*, and of course incapable of recovering damages. And on this account it is contended, that inasmuch as the plaintiff cannot recover the judgment he prays, that he must be barred from maintaining his action generally, according to the prayer of the defendant's plea. But this by no means follows; for the

1804.

LE BRET *against* PAPILLON.

the Court may, and ought ex officio, to give ſuch judgment on the whole record as ought to be given, without regard to the iſſues found, or to any imperfection in the prayer of judgment made on either ſide. In *Plowd.* 66. *Montague* C. J. ſpeaking of the plea of the defendant in that caſe, ſays, " He ought to have concluded non eſt " factum, and not judgment ſi actio, as he has done; " for which reaſon the concluſion is bad. Further, inaſ- " much as the concluſion in this point is bad, it is to be " ſeen what ſhall be done if it appear to us Judges that " upon the matter in law the deed is void; and it ſeems " to me (he ſays) that we, by our office, ought to give " judgment againſt the plaintiff; for although the de- " fendant may not take the advantage, yet, inaſmuch as " it appears to us that the plaintiff has no cauſe of action, " we ought to give judgment againſt him." And afterwards, p. 69. " he ſhall have benefit by the office of " the judge, notwithſtanding the bad concluſion to the " action, as I have ſaid before." So alſo, *Fraunces*'s caſe, 8 *Co.* 93. and *Weſtlie* v. *King*, *Winch.* 75. to the ſame effect. And indeed, if it were neceſſary to cite authorities on ſuch a ſubject, in *Kirk* v. *Nowell*, 1 *Term Rep.* 125., and in many other caſes, judgment has been entered up according to the right appearing in favour of the plaintiff on the whole record, notwithſtanding an iſſue on a bad plea in bar found againſt him. In *Street* v. *Hopkinſon and Others*, 2 *Str.* 1055. and *Rep. temp. Hardw.* 345. the Court held expreſsly that they were not bound by the prayer of an improper judgment; and therefore pronounced the rule that the plaintiff in error in that caſe ſhould be barred, contrary to the terms of the defendant's prayer, which was that judgment might be affirmed. And there is no difference between the office of the Court in this

1804.

LE BRET *against* PAPILLON.

this particular in a court of error, and in the court of original jurisdiction, which gives the judgment in the first instance. If therefore we have power, as upon these and other authorities we have, to give the proper judgment in this case, and that judgment be, as it appears to us it will be, that the plaintiff be barred from further having and maintaining his action, we shall feel it our duty to give that judgment; and we do pronounce the same accordingly.

Monday, Feb. 6th.

FIELDHOUSE *against* CROFT.

Money, the surplus of a former execution against the defendant's goods, refused to be stayed in the late sheriff's hands for the purpose of satisfying another execution at the suit of the same plaintiff against the same defendant, who had no other effects on which the sheriff in office could levy.

WIGLEY moved for a rule to shew cause why the sum of 317*l.* 11*s.* 9*d.* belonging to the defendant in the hands of the late sheriff of *Worcester*, should not be paid over by him to the present sheriff; which money was part of a balance of 900*l.* and upwards in the late sheriff's hands, arising from a sale of a certain property belonging to the defendant, over and above the sum levied by the same sheriff under a prior execution. And notice of this motion was given to the defendant and to the late sheriff. It appeared from the affidavit on which the rule was moved that the plaintiff had before recovered judgment and sued execution against this defendant for 1043*l.* which was levied by the late sheriff, who took in execution the tolls of a turnpike, mortgaged to the defendant for a term, and sold the same for 2010*l.*, which, after payment of the former debt and costs, left a large balance in his hands. That the plaintiff had recovered judgment for 307*l.* and costs, in *February* last, against the defendant in another action in the Court of Pleas of the city of *Worcester*, on which a writ of fieri facias issued to the serjeants at mace, who le-

1804.

FIELDHOUSE *against* CROFT.

vied thereon 45*l.* 10*s.* and returned that the defendant had no other goods in the city. Whereupon the record being removed into this Court, another writ of fieri facias issued to the present sheriff of the county, but no other effects of the defendant could be found whereon to levy than those in the hands of the late sheriff, which he had had notice not to pay over.

He admitted that he could find no authority in point; but the case which came nearest was *Armstead* v. *Philpot* (*a*), where a rule was made absolute (though without resistance, except so far as regarded the lien of the attorney) for staying in the sheriff's hands for the use of the plaintiff in that action money which the sheriff had levied for the use of the then defendant in another action, in which he was plaintiff.

Lord ELLENBOROUGH C. J. The question comes to this, Whether a plaintiff can have execution of *money* belonging to the defendant in the hands of a third person? This is a motion of the first impression, and shall not have its first effect from me. It was the duty of the late sheriff, if he took in execution more than was necessary to satisfy the former execution with which he was charged, to pay over the surplus immediately to the defendant.

Per Curiam, Rule refused (*b*).

(*a*) *Dougl.* 231. (*b*) Vide *Francis* v. *Nash*, *Rep. temp. Hardw.* 53.

1804.

Monday, Feb. 6th.

The KING *against* DOWLEY.

Members of volunteer corps, enrolled under the regulations of the stat. 42 *Geo.* 3. *c* 66. are entitled to resign on due notification of such their intention, not being restrained from such liberty of resignation by the rules of the corps to which they belong, or its conditions of service: and this liberty is not taken away by stat. 43 *Geo.* 3. *c.* 96. (the General Defence Act), which distinguishes between *volunteer corps*, and *volunteers under that act*; i. e. such as offer themselves voluntarily to serve in lieu of the compulsory levy. And the stat. 43 *G.* 3. *c.* 121. attaches only on corps of volunteers *at the time of an actual invasion*, and has no retrospective operation on those who had ceased to bear that character before actual invasion.

A Conviction of a volunteer, under the statute, for non-payment of certain fines, imposed on him for non-attendance at certain times of exercise appointed for the corps to which he belonged, stated in substance, that on the 10th of *December*, 44 *Geo.* 3., at *Southwark* in the county of *Surry*, before *P. B.* Esq. one of the justices, &c. came *T. E.* of, &c. and informed the said justice, that before and at the respective times of committing the offences aftermentioned there was a certain corps of volunteer cavalry called the *Southwark* Volunteer Cavalry, commanded by Capt. *J. C.* duly formed and established, and whose offer of service had been duly accepted by his Majesty according to the statute, &c. That every member of the said corps, upon his being enrolled, signs a written engagement to appear on horseback to be exercised at such times and places as the commanding officer shall appoint: and that the defendant, on the 4th of *August* 1803, was duly enrolled a member of the said corps, and thereupon signed such written engagement as aforesaid, and continually from thence until, &c., and at the time of exhibiting the said information, was a member of the said corps and duly enrolled therein. That on the 25th of *October* 1803, *J. C.*, the commanding officer of the corps, ordered that the corps should be in *Hyde Park* on *Friday* the 28th of *October*, at eight o'clock, the hour of muster to be half-past six, &c; and that in future the field-days should be on *Thursday* at two o'clock, the corps to muster at, &c., and drill mornings *Tuesdays* only, at seven. That on the 25th of *October* in the said year the corps did duly make

1804.

The KING *against* DOWLEY.

these regulations; "That every member who did not muster on *Friday* next at the hour appointed, (meaning the said *Friday* the 28th of *October*) should be fined 10*s*. 6*d*. That on the muster-roll being called, drill mornings, any one who did not answer to his name should be fined." (It then set out the list of fines made for officers and privates on the first, second, third, and fourth offences respectively.) "That no excuses be allowed but illness, certified by Surgeon *D*., or leave of absence from the commanding officer." Of which order and of which regulations the defendant, being a private in the said corps, had due notice. That in pursuance of the said order the corps did muster on the said *Friday* the 28th of *October*, at, &c. and did march from thence to *Hyde Park* to be reviewed: nevertheless the defendant, not regarding his duty in that behalf, did not attend the said muster or review, but then and there wholly omitted and neglected so to do, he the defendant not being prevented from so doing, or having any excuse for such non-attendance by illness, &c. or having leave of absence, &c.; by reason whereof the defendant then and there forfeited the sum of 10*s*. 6*d*. for such neglect. In like manner the information proceeded to charge the defendant with having forfeited several other sums by reason of non-attendance on certain other muster and field days. It then stated a demand by the secretary of the corps on the defendant, on the 3d day of *December* 1803, at *Southwark* aforesaid, of 1*l*. 14*s*., the amount of the several penalties incurred, and a refusal by the defendant to pay the same. By reason whereof, and by force of the statute, &c. the defendant had forfeited the further sum of 3*l*. 8*s*., being double the amount of the said penalties so by him forfeited for such neglect and absences as aforesaid: wherefore the said *T. E.* prayed

 that

1804.

The King against Dowley.

that the defendant might be convicted of the ſaid offences according to the form of the ſtatute, &c. It then ſet forth the ſummons of the defendant, his plea of not guilty, and the hearing of the evidence in his preſence, on the 17th of *December*, 44 *Geo.* 3., when he admitted all the matters in the information to be true, *except that he continued to be a member of the ſaid corps at the time of the making the rules and regulations, reſpecting the ſaid fines in the ſaid information mentioned, or at the times of the non-attendance of him the ſaid* T. Dowley *in the ſaid information mentioned;* on which point the following facts were admitted and agreed upon before the juſtice by the informant and the defendant. That the ſaid corps was originally formed and eſtabliſhed, and their offer of ſervice accepted by his Majeſty, in the year 1798, in purſuance of the act of the 34 *Geo.* 3. *c.* 31. for encouraging and diſciplining ſuch corps as ſhould voluntarily enrol themſelves for the defence of their counties, towns, &c. That after the paſſing of the ſtat. 42 *Geo.* 3. *c.* 66. "to enable his Majeſty to "avail himſelf of the offers of certain yeomanry and vo-"lunteer corps to continue their ſervices," and in *Auguſt* 1803 the ſaid corps agreed to continue their ſervices; and upon ſuch agreement every member ſigned a muſter-roll, containing the following written engagement: "We "whoſe names are hereunto ſubſcribed do ſeverally "pledge ourſelves to be faithful to the conſtitution of "this realm, as by law eſtabliſhed in King, Lords, and "Commons, and do ſeverally agree to engage ourſelves in "the troop of *Southwark* Volunteer Cavalry, under the "command of Captain *John Collingdon*, and to appear on "horſeback to be exerciſed at ſuch times and places as "the commanding officer ſhall appoint. And we do "further promiſe and agree to comply with the rules and

"regula-

1804.

The KING against DOWLEY.

" regulations hereunto annexed; and alfo with the acts " of parliament of 34 & 42 *Geo.* 3. As witnefs, &c. 4th " of *Auguft* 1803." That the rules and regulations annexed to the faid mufter-roll and referred to therein as aforefaid are as follow: 1ft, That the corps be inftituted for the defence of the borough of *Southwark* and parts adjacent, fubject to be called on in cafe of actual invafion or infurrection agreeable to the acts of the 34 & 42 *G.* 3. 2d, That each troop confift of 50 privates, one captain, &c. 3d, That the corps be regulated by a committee of all the officers and 12 privates, five of whom to have the power of deliberating and deciding on the bufinefs before them. That the privates of fuch committee be chofen by ballot at a general meeting, but that a committee to inveftigate the conduct of any member of the corps, to confift of all the officers and not lefs than fix privates; and any individual who fhall think himfelf aggrieved by the decifion of fuch committee may appeal to a general meeting of the troop upon giving notice to his commanding officer within one month after receiving the determination. 4th, Regulates the mode of balloting for members. 5th, That every member pay annually three guineas towards the general expences of the corps. 6th, That each member provide and keep his horfe at his own expence, and alfo provide his own uniform and all accoutrements. 7th, Regulates the defcription of horfes. 8th, That every volunteer going 20 miles from home fhall fignify by letter to the commanding officer the time of his abfence, and alfo notify his return, that the ftrength of the corps may at all times be known and correct returns made. (The 9th was for the regulating difputes on the ground.) That the defendant was duly enrolled as a member of the corps, and figned the faid mufter-roll, with the faid rules and

1804.

The KING *against* DOWLEY.

regulations annexed thereto, on or about the 4th of *Auguſt* 1803. That he was a private in the ſaid corps, and was ſo at the time of the ſeveral non-attendances in the ſaid information mentioned, *if under the circumſtances hereinafter ſtated he is to be conſidered as then being a member of the corps.* That the renewed offer of ſervice of the corps was made to his Majeſty on the 17th of *Auguſt* 1803, and accepted on the 22d of the ſame month. That a committee was duly appointed purſuant to the 3d of the ſaid rules and regulations, who propoſed the rules and regulations reſpecting fines in the information mentioned to a general meeting of the ſaid corps, holden on the 25th of *October* 1803, who adopted the ſame. That on the 23d of *September* 1803, and before the making the laſt-mentioned rules and regulations, Captain *C.* cauſed to be delivered to the ſeveral members of the corps, and amongſt others to the defendant, who was then a private, a letter in which, after obſerving that many of the members had been remiſs in their attendance, which it was his duty to enforce, he ſtated that "whoever did not attend one of the morning drills, and alſo *Thurſday* in every week for one month to come would receive his diſmiſſal." In anſwer to this the defendant wrote a letter to Captain *C.* on the 24th of *September* 1803, ſtating that "It being entirely out of his "power to attend the number of days ſpecified, &c. he "therefore preſumed this would be accepted as his reſig-"nation." By another letter, of the 24th of *September* 1803, Captain *C.* declined accepting the reſignation of the defendant, or any other member of the corps, on a principle of duty. To which the defendant again anſwered, on the 27th of *September* 1803, that it was impoſſible for him to attend as ordered, and, therefore, to ſave the trouble of ſending a diſmiſſal, he thereby *declared himſelf*

no

1804.

The KING *against* DOWLEY.

no longer belonging to the corps, and insisted on that being accepted as his resignation. Other letters were stated to the same effect, in one of which the captain apprized the defendant that if he absented himself much longer from duty, he would hear of it in an unpleasant way. The magistrate then found as a fact, that the defendant did, by the said letters, notify to the captain his intention to discontinue his services in the corps, and did resign his situation in the said corps as far as in him lay, and if by law he might. That the defendant has not in any manner acted as a member of the said corps since the writing of the letter of the 24th of *September*, nor has Captain *C.* agreed to accept his resignation; but, on the contrary thereof, has constantly refused so to do. That the defendant's name has not at any time been struck off from the muster-roll, but still continues thereon. On this evidence the magistrate proceeded to convict the defendant in the several sums of 1*l.* 4*s.*, the amount of the fines incurred, and 3*l.* 8*s.*, the double of the same. Which conviction was dated the 17th of *December* 1803.

The conviction was argued on a former day in this term by *Erskine* for the defendant, and *the Attorney-General* for the prosecution; when the Court said they would look into the acts of parliament before they gave judgment. And now

Lord ELLENBOROUGH C. J. delivered the opinion of the Court.

In this case the question appears to us to lie in a narrow compass: it is to be decided upon the facts as they appear on the face of this conviction, which may not immediately apply to any other case; and each case must of course be governed by the particular circumstances

 belonging

1804. The KING *against* DOWLEY.

belonging to it. The terms upon which the corps of the *Southwark* Volunteer Cavalry agreed to continue their ſervices in the month of *Auguſt* 1803 are to be found in *the rules and regulations* ſtated in this conviction, or, in the ſtatutes of the 34 or 42 *G*. 3. The rules and regulations themſelves are ſilent as to *the period* during which each member of the corps is to ſerve; and nothing can be collected from the ſtat. 34 *G*. 3. *c*. 31. as to this point. But the ſtat. 42 *G*. 3. *c*. 66. *ſ*. 4. recognizes a power in the members of, at leaſt, ſome volunteer corps of *notifying their intention of diſcontinuing their ſervice;* and provides that, *on ſuch reſignation*, (which expreſſion clearly imports that the party had legally and effectually the power of making a reſignation by his own act,) if the perſon, (that is to ſay, ſo reſigning,) ſhould have been drawn for the militia, that his exemption ſhould ceaſe, and that he ſhould be liable to ſerve in the militia by himſelf or his ſubſtitute, as a ſupernumerary, if his vacancy ſhould have then been filled up. The agreement, therefore, of this corps to continue its ſervice muſt be underſtood as made on the condition of the members having it in their power to exerciſe the right of reſignation thus recognized by the ſtat. 42 *G*. 3. *c*. 66. by notifying their intention of diſcontinuing their ſervice. It is next to be ſeen whether this power has been taken away by any of the ſubſequent acts of parliament. The 43 *G*. 3. *c*. 96. (the act for the levy en maſſe, as it has been called) ſpeaks of two deſcriptions of volunteers, viz. *volunteer corps*, which had been or ſhould be formed with the approbation of his Majeſty, and *volunteers under that act;* that is, a deſcription of perſons whom the conſtables, in the annual liſts which they are directed to make of all men dwelling in their pariſhes, are by *ſ*. 10. required to diſtinguiſh as "*perſons willing to engage to*

1804.

The King against Dowley.

ſerve as VOLUNTEERS UNDER THAT ACT." And this ſame act of the 43 *G.* 3. *c.* 96., by the 53d *ſ.* thereof, enables the king to ſuſpend the proviſions of the act requiring the men enrolled under it for military ſervice to be trained and exerciſed, where any volunteer corps in any county or pariſh, or in which any perſons between the ages of 17 and 55, ſhall have engaged to ſerve *as volunteers* (that is to ſay, *under that act*) ſhall amount to a certain proportion of the number enrolled for military ſervice *under that act*, and ſuch *volunteer corps* or *volunteers reſpectively* ſhall have *agreed to be trained and exerciſed and to march to any part of* Great Britain *in caſe of an invaſion*; ſubject to ſuch conditions as to number of men to be conſtantly exiſting in *ſuch volunteer corps* and remaining engaged to ſerve *as volunteers under that act*, and to ſuch other rules and regulations as to exerciſe, muſter, or inſpection, as to his Majeſty ſhall ſeem neceſſary: on non-compliance with which conditions the proviſions of the act are to take place. It is to be obſerved that nothing is here ſaid about *the period of ſervice*. All that is neceſſary to authoriſe a ſuſpenſion of the proviſions for the levy en maſſe is, that the volunteer corps and volunteers ſhall have *agreed to be trained and exerciſed and to march* in caſe of invaſion, &c. and if they do not comply with ſuch conditions, then the levy en maſſe is to go forward. But the ſuſpenſion of the execution of this act cannot impoſe terms on the volunteer corps, unleſs they have before agreed to thoſe terms, or unleſs their offer of ſervice has been accepted on ſuch terms. The 54th ſection of *c.* 96. does, however, ſpeak of *the period of ſervice*; but it does ſo in terms confined to *the volunteers under that act*, who are made liable to be embodied, commanded, and to ſerve *for the period* mentioned in the act, in relation to perſons *liable to military*

 ſervice

1804.

The King *against* Dowley.

service under the act, i. e. the persons liable to serve in the army en masse: but it is wholly silent with respect to *the period of service* of the *volunteer corps*, leaving that matter as it stood before the act. The last statute which has been adverted to, the 43 *G.* 3. *c.* 121. in *f.* 9., leaves this point untouched; that only relating to persons who may be members of any *corps of volunteers* at *the time of an actual invasion*, and has no retrospective view to those who may have ceased to bear that character before an actual invasion happens. The 14th section of that statute seems to afford some inference that volunteers had not the power of resigning, as the power of convicting persons for non-payment of fines for not complying with the regulations of their corps can have very little effect when the objects of such a provision may the next moment and for ever exempt themselves from any liability to be fined by quitting their corps: but it will have an operative effect and use in corps where, according to their terms of service, the members are precluded from quitting. However, neither the inference that may be supposed to arise from this section, nor from any other in the several acts which have been commented upon, nor from the scope and object of the whole of them taken together, appears to us sufficiently strong to warrant us in determining that the express power of resignation, which is recognized in the 4th section of the stat. 42 *G.* 3. *c.* 66., as belonging to the members of volunteer corps, not restrained in this respect by their own offers of service, is revoked and taken away from them. We are, therefore, of opinion, that the defendant was, upon the facts stated in this particular conviction, competent to exercise, and has exercised that power; and that this conviction, therefore, cannot be sustained, but must be quashed.

Conviction quashed.

1804.

COOPER *against* RACHAEL HUNCHIN.

Tuesday, Feb. 7th.

After interlocutory judgment against a feme upon a contract, she marries: yet the plaintiff may proceed to judgment and execution against her, without joining the husband by scire facias; and a capias ad satisfaciendum against her, following the judgment, is at all events regular, though the plaintiff had notice of the marriage before.

A Rule called upon the plaintiff to shew cause why the writ of capias ad satisfaciendum, executed upon the defendant, should not be set aside for irregularity, &c. upon the ground that after interlocutory judgment obtained in an action commenced against the defendant when sole, for goods sold, &c. she had intermarried one *R. Ridgway*, of which notice was given to the plaintiff's attorney, notwithstanding which he had proceeded against her to final judgment, and had taken her body in execution.

Espinasse shewed cause, and contended that the execution was regular; and cited 3 *Blac. Com.* 414. where it is laid down that "if an action were originally brought against a wife when sole, and pending the suit she marries, the capias shall be awarded against her only, and not against her husband;" for which is cited *Doyley* v. *White*, *Cro. Jac.* 323. in point, and *Bull. N. P.* 23. S. C.

Barry, in support of the rule, endeavoured to distinguish this from the case cited, where the original action brought against the feme was *trespass*, in which she may be sued criminaliter; whereas this is upon a contract, for which she is in no event liable to be taken in execution after marriage, when it becomes the debt of the husband. There too the action was false imprisonment against the sheriff, to whom the process against her by her maiden name was a sufficient justification. But here the application is against the original party in the original suit, who ought,

1804.

COOPER *against* HUNCHIN.

ought, upon due notification of the marriage, to have made the hufband a party by fuing out a fcire facias againft him jointly with the wife, and then the plaintiff would have had his proper remedy againft him. As in the cafe of *Obrian* v. *Ram*, cited 1 *Salk.* 116, 117. So in 1 *Show.* 91. *Anonym.*, if a woman give a warrant of attorney and then marries, the plaintiff may file a bill and enter judgment againft both (*a*). [Lord *Ellenborough* C. J. There, perhaps, the action might be confidered as commenced at the time when judgment was entered up, and then fhe was married.] He alfo referred to *Rownfon and Wife* v. *Williamfon* (*b*), and *Heard* v. *Stamford* (*c*), as general authorities to fhew that the hufband was liable in the lifetime of the wife for her contracts.

Lord ELLENBOROUGH C. J. The execution muft follow the nature of the judgment. Whether the hufband can bring error or not is another queftion. But the judgment here being againft the feme only, the execution can only be againft her. If the plaintiff had meant to implicate the hufband in the confequences, he muft have firft made him a party by joining him in a fcire facias.

GROSE J. of the fame opinion.

LAWRENCE J. There is no occafion for the plaintiff to fue out a fcire facias, unlefs it be for the purpofe of charging fome other perfon on the record who was not originally a party to it. The cafe cited from *Cro. Jac.* is in point.

(*a*) Vide *Marder* v. *Lee*, 3 *Burr.* 1471.; and *Cowrie* v. *Allaway*, 8 *Term Rep.* 257.

(*b*) Qto. *Barnes*, 207. (*c*) 3 *P. Wms.* 409.

LE

LE BLANC J. If the hufband had been joined, the plaintiff might ftill have taken the wife in execution. There feems, therefore, no reafon why the defendant might not take her at once, without joining the hufband, if he did not mean to affect him.

Rule difcharged.

PAYNE *againft* DREWE.

Wednefday, Feb. 8th.

Allowing that the award of a writ of fequeftration out of Chancery (which is the procefs of that Court to compel appearance and the performance of decrees) has the fame obligatory effect to bind the goods as a writ of fi. fa at common law; yet if the party at whofe prayer fuch fequeftration is iffued take no meafure to compel the execution of it in due time, and the fequeftrators do not in fact poffefs themfelves of the goods, it is no excufe to a fheriff, to whom at a diftance of 18 months a writ of fi. fa is directed againft the goods of the party defendant in the fuit in Chancery, for not executing fuch writ and felling the goods; the plaintiff in the fequeftration having at all events loft his priority by fuch laches. And therefore the fheriff, who had failed under the fi. fa., having on notice of fuch fuppofed obftacle returned nulla bona, was holden liable to the plaintiff in an action for a falfe return. Though a writ of fi. fa. bind the goods as againft the defendant, yet the property is not devefted out of him till execution executed: and therefore an execution and fale under a fubfequent writ delivered to the fheriff will bind the goods; but the plaintiff in the firft execution has his remedy againft the fheriff, if the non-execution of the writ did not proceed from his own laches.

THIS was an action againft the defendant, as fheriff of *Dorfetfhire*, for a falfe return of nulla bona to a writ of teftatum fieri facias, fued out on a judgment againft *C. Sturt* Efq. for 227*l.* 10*s.* The action was tried at the Spring Affizes for *Dorfetfhire* 1803, before *Thomfon* B., when a verdict was found for the plaintiff for 227*l.* 10*s.* fubject to the opinion of the Court on the following cafe.

The defendant was fheriff of the county of *Dorfet* at the fuing out and return of the writ in queftion. The judgment was regularly obtained for the plaintiff againft *C. Sturt* in *Michaelmas* term 1801, for 227*l.* 10*s.*, and a teftatum fieri facias was fued out into *Dorfetfhire* on the 28th of *November* 1801, returnable on *Saturday* next after eight days of *St. Hilary* 1802. There were fufficient goods of *C. Sturt* at his houfe at *Brownfea* in the defendant's bailiwick at the time of the entry of the officer un-

der

1804.

PAYNE *against* DREWE.

der the fieri facias in *January* 1802, and which were taken poſſeſſion of, and an inventory made thereof by him; but the ſheriff afterwards quitted poſſeſſion, and made a return of "nulla bona," in conſequence of the. ſequeſtration hereinafter mentioned. In 1790 a bill in Chancery had been filed againſt *C. Sturt* and others by *H. W. Portman* Eſq. and others, and after anſwer was put in and other proceedings, an order was made by that Court, on the 17th of *March* 1800, for the payment of 2000*l.* by the ſaid *C. Sturt* to *H. A. Sturt*. That ſum being unpaid, an order niſi for a commiſſion of ſequeſtration to iſſue, directed to certain commiſſioners to be therein named, to ſequeſter the ſaid *C. Sturt*'s perſonal eſtate, &c. was made on the 5th of *May* 1800, which order was made abſolute for a ſequeſtration on the 13th of *June* 1800. A writ of ſequeſtration under the great ſeal was iſſued on the 17th of *June* 1800, dated on that day, and was ſhortly afterwards delivered to the ſequeſtrators therein named. The writ of ſequeſtration is in the following words: "*George* the Third, &c. To *J. M.*, *W. D.*, &c. "greeting. Whereas by an order made by us in our "Court of Chancery, on the 5th day of *May* laſt, in a "cauſe of *H. W. Portman* Eſq. complainant, and *M.* "*Sturt* widow, *H. A. Sturt*, Eſq. *C. Sturt* Eſq. and others, "defendants, by original and ſupplemental bills; and "alſo in a cauſe of the ſaid *H. A. Sturt*, complainant, "and the ſaid *M. Sturt*, *C. Sturt*, and others, defend-"ants, by bill of revivor, it was ordered that a commiſ-"ſion ſhould iſſue, to be directed to certain commiſſioners "to be therein named, to ſequeſter the defendant *C.* "*Sturt*'s perſonal eſtate, and the rents, iſſues, and profits "of his real eſtates, until he ſhould have paid 2000*l.* to "the complainant *H. A. Sturt*, purſuant to an order,

"dated

" dated the 17th of *March* laſt, and our ſaid Court ſhould " make other order to the contrary; unleſs the ſaid de- " fendant, having perſonal notice thereof, ſhould, within " eight days after ſuch notice, ſhew cauſe, &c. to the " contrary. And whereas, upon motion made unto our " ſaid Court on the 13th of *June* inſtant, by the counſel " for the ſaid *H. A. Sturt*, it was alleged that due notice " had been given of the ſaid order to the ſaid defendant " *C. Sturt*, as by affidavit appeared; and that it alſo ap- " peared by affidavit, &c. that the ſaid *C. Sturt* had not " yet paid the ſaid 2000*l*., or any part thereof, &c.; and " therefore it was prayed that the ſaid order, dated the " 5th of *May* laſt, might be made abſolute; which was " ordered accordingly. Know ye therefore that we, by " theſe preſents, do give to you, &c. full power and au- " thority to enter upon all the real eſtate, &c. of the ſaid " *C. Sturt*, and to take, collect, receive, and ſequeſter " into your hands not only all the rents and profits of the " ſame, &c. but alſo all goods, chattels, and perſonal " eſtate whatſoever. And therefore we command you, " &c. that you do, at certain proper and convenient days " and hours, go to and enter upon all the meſſuages, &c. " and real eſtate of the ſaid *C. Sturt*, and that you do " collect and take, not only the rents and profits of his " ſaid real eſtates, but alſo all his goods, chattels, and " perſonal eſtate, and detain and keep the ſame under " ſequeſtration in your hands until the ſaid *C. Sturt* ſhall " have fully paid the ſaid 2000*l*. to the ſaid *H. A. Sturt*, " cleared his contempt, and our ſaid Court make other " order to the contrary. Witneſs, &c. the 17th of *June* " in the 40th *Geo.* 3. &c." On the 18th of *November* 1800 another order of the ſaid Court was made, which directed certain annuitants therein named (*I. W.*, *F. B.*, and

1804.

PAYNE *against* DREWE.

1804.

PAYNE *against* DREWE.

and *F. E.*) to pay a certain ſum therein mentioned to *H. A. Sturt*, and directed that they ſhould have the benefit of the ſequeſtration. On the 17th of *January* 1803, by an order of the Court of Chancery of this date, ſtating an application to the Lord Chancellor by counſel for *I. W.* and *F. E.*, it was alleged "that *H. Sturt*, deceaſed, by his will deviſed his eſtates to his ſon *C. Sturt* for life ſubject to certain charges therein; and after the teſtator's death a ſuit was inſtituted for the purpoſes of carrying into execution the truſts of the will; and, by an order made the 17th of *March* 1800, it was ordered that *C. Sturt* ſhould pay to *H. A. Sturt* 2000*l.* in part of a larger ſum reported due to him; but the ſaid *C. Sturt*, not having complied with the ſaid order, the ſaid *H. A. Sturt*, on the 5th of *May* 1800*l.*, obtained an order that a commiſſion of ſequeſtration ſhould iſſue to ſequeſter the perſonal eſtate of the ſaid *C. Sturt*, and the rents of his real eſtate, unleſs cauſe ſhewn within eight days; and no cauſe being ſhewn, the ſame was made abſolute; and a commiſſion of ſequeſtration iſſued on the 10th of *June* 1800, directed to *J. M.*, *W. D.* &c. who entered upon the eſtates deviſed to *C. Sturt* for his life, and ſequeſtered his perſonal eſtate, and the ſequeſtrators received 1090*l.*, part of the rents of the real eſtates. The ſaid *C. Sturt* having, in the year 1793, granted to the ſaid *I. W.*, *F. B.*, and *F. E.*, an annuity of 2400*l.*, charged upon his eſtates before mentioned; the annuitants had been let into poſſeſſion of the eſtates, and were ouſted of that poſſeſſion by the ſequeſtrators under the authority of the ſaid order, and under the authority of another order, dated 8th of *July* 1800, whereby the tenants were ordered to attorn to the ſequeſtrators. And the ſaid annuity being greatly in arrear, and the annuitants conceiving that the poſſeſſion of the

the ſequeſtrators did not prevent their making a diſtreſs on the perſonal eſtate for the arrears; they accordingly made two diſtreſſes at *Brownſea* and *Critchell*, and Mr. *Dean*, one of the ſequeſtrators, ſigned acknowledgments of poſſeſſion on the back of the notices and inventories of diſtreſs, whereby he acknowledged that he held poſſeſſion of goods diſtrained for the purpoſes of the diſtreſs. That conſiderable part of the effects diſtrained being heir looms, they were replevied by the truſtees under the teſtator's will. That in *Michaelmas* term 1800 the parties to the ſaid ſuit and the ſequeſtrators, conceiving that the annuitants ought not to have made a diſtreſs, applied by motion to the Court, and the annuitants, finding that they would not receive the benefit of their diſtreſs, except on the terms of paying the money remaining due to *H. A. Sturt* and the younger children of the teſtator, by an order made the 13th of *November* 1800, it was ordered that the annuitants ſhould, within a week, pay to *H. A. Sturt* 2464*l.* 1*s.* 10*d.*, and enter into an agreement to pay him the further ſum of 5700*l.*, then aſcertained to be due to him, and to pay to the younger children of the teſtator the ſeveral ſums of money reported due to them out of the rents and profits of the ſequeſtered eſtates as the ſame ſhould come to their hands. And it was further ordered that the annuitants ſhould give judgment in the replevin cauſe, and pay the coſts of the diſtreſs: but ſuch of the goods as were not heir looms were to be accounted for by the ſequeſtrators. And it was ordered that the annuitants ſhould pay the coſts of the ſequeſtration; and that the ſequeſtrators ſhould deliver the poſſeſſion of the premiſes ſequeſtered to the annuitants, and pay over to them the balance in their hands, after retaining the coſts of the ſequeſtration, and all juſt allowances; and that the annuitants

1804.

PAYNE *against* DREWE.

nuitants ſhould ſtand as creditors of the ſaid *C. Sturt* for what they ſhould ſo pay, except the coſts of the diſtreſs and replevy, and of the applications to the Court ſubſequent to the diſtreſs. And it was referred to the Maſter to ſettle the accounts and tax the coſts. " That the an- " nuitants, in conſequence of the ſaid order, paid the ſaid " 2464*l.* 1*s.* 10*d.* to *H. A. Sturt,* and alſo paid to the " younger children of the ſaid teſtator all the monies due " to them, and were let into poſſeſſion of the real eſtates; " but before the ſequeſtrators ſettled any account or the " coſts were taxed, ſome executions at common law were " iſſued againſt the goods of *C. Sturt,* particularly one to " a large amount, at the inſtance of Mr. *E. May,* in " *Hilary* term 1802; and the ſheriff of *Dorſetſhire,* under " the execution, ſeized the goods both at *Critchell* and " *Brownſea,* and inſiſts on keeping poſſeſſion, although " the ſaid *W. Dean,* as one of the ſequeſtrators, has " claimed the ſaid goods. That there yet remains an " arrear of 4000*l.* and upwards due to the annuitants; " and therefore it was prayed that an attachment might " be iſſued againſt the ſheriff of the county of *Dorſet* for " his contempt, in having ſeized and kept poſſeſſion of " certain goods (formerly belonging to the defendant " *C. Sturt*), the ſaid goods being under ſequeſtration un- " der the order of this Court; and that the ſequeſtra- " tors might be directed to proceed to a ſale of the ſaid " goods, not being heir looms, ſo under ſequeſtration, and " pay the produce thereof to *I. W.* and *F. E.*, purſuant " to the order of the 13th of *November* 1800. Where- " upon, and upon hearing counſel for the ſeveral parties, " and for the ſaid *E. May,* and for the ſaid ſheriff of " *Dorſet,* and the ſeveral orders before mentioned being " read, his Lordſhip did order that the ſequeſtrators

" ſhould

" ſhould proceed to a ſale of the goods in queſtion, not " being heir looms, then under ſequeſtration, and pay " the produce thereof to the annuitants, as directed by the " order of the 13th of *November* 1800, in or towards ſa- " tisfaction of the ſum of 4464*l.* 1*s.* 10*d.* due to them; " and in caſe there ſhould be any ſurplus of the money " ariſing by the ſaid ſale, after ſatisfying the demands of " the ſaid annuitants, it was ordered that the ſame (the " amount thereof to be verified by affidavit) ſhould be " paid into the Bank, to be placed to the credit of the " cauſe, ſubject to further order." There was no evidence given at the trial of any of the facts ſtated in the above order, or of the ſequeſtrators' having ever taken poſſeſſion of any of the goods. On the contrary, it was admitted that the ſequeſtration had never been laid on. And in *January* 1802, before the return of the writ, (which was delivered to the defendant on the 17th of *December* 1801), when Mr. *Starling*, an agent for the plaintiff, went with the ſheriff's officer, who had a warrant, to *C. Sturt*'s houſe at *Brownſea*, Mr. *Sturt* was in poſſeſſion of the houſe and goods. Upon their communicating to him the buſineſs they came upon, he told them that his goods were under ſequeſtration; but the officer, by the direction of *Starling*, took the goods, and, with his aſſiſtance, made an inventory; after which *Starling* went away, leaving the officer in poſſeſſion. The ſheriff, at the return of the writ, returned "nulla bona." The queſtion for the opinion of the Court was, Whether the plaintiff were entitled to recover? If he were, the verdict to ſtand; if not, a nonſuit to be entered.

1804.

PAYNE *againſt* DREWE.

This caſe was argued in *Michaelmas* term laſt.

1804.

DREWE.

Gaselee, for the plaintiff, argued, first, from the general nature of a sequestration issued by the Court of Chancery, that it conveyed no title to the goods, which still remained the property of the original owner, and consequently was no impediment to the execution of the writ of fieri facias upon his goods by the sheriff. There was no case, he said, in a court of law upon the effect of a sequestration. But it has been long used as process out of the Court of Chancery either to enforce an appearance or to compel performance of a decree. 1 *Chan. Cas.* 91. It abates on the death of the party. Some authorities indeed, in contradiction to others (*a*), represent it as not abateable where it is for the performance of a decree; as in *Hawkins* v. *Crook* (*b*), and *Burdett* v. *Rockey* (*c*); and in the latter it is said to bind from the time of awarding the commission, and not only from the time of its being executed. But it does not appear there that the interest of third persons, not parties to the decree, was involved. Even a sale under a decree of the Court of Chancery conveys no title per se. That Court does indeed direct the sale; and the property may be bound under it, when executed; but that passes by the delivery of the parties, and not by force of the decree. This was so considered by Lord Chancellor in *Shaw* v. *Wright* (*d*). That was an application for an order to sequestrators to sell houses; but Lord Chancellor said that the order would do no good: he could make no title. That the sequestration did not transfer the term to the sequestrators; it was only process to compel appearance: and he could not compel the purchaser to take a a title which he was to support by a bill for an injunction.

(*a*) Vide 2 *P. Wms.* 621, 2. and *Wharam* v. *Broughton*, 1 *Vef.* 182.
(*b*) 3 *Atk.* 594. (*c*) 1 *Vern.* 58. (*d*) 3 *Vef. jun.* 23.

1804.

PAYNE *against* DREWE.

tion. But, secondly, Supposing that the party claiming under the sequestration had once acquired a priority, like as in the case of a prior execution at common law, yet, as in that case, they may forfeit such priority by laches. Now here they have been guilty of great laches; for the sequestration issued on the 5th of *May* 1800, and in *January* 1803 the sequestrators had taken no steps to get possession of the goods, and so to bind the property. And if this could avail, it would impede the course of justice in all other cases. If the sheriff found himself under any difficulty how to act under these conflicting rights and processes, he should, before he made his return, have applied to this Court to know what he should do, or he might have summoned a jury to inquire whose property the goods were. [Lord *Ellenborough* C. J. That is merely to govern his discretion.] But here the sheriff has taken upon him to act, without the aid of the Court, which would have given him time to make his return, till the question of priority had been settled (*a*). This Court will never treat the process of the Court of Chancery with more respect than they would do their own; and if a party merely issued a pocket execution, without calling on the sheriff to carry it into effect, the Court would not suffer that to impede the execution of subsequent process followed up with due diligence. Before the statute of frauds goods were bound by the teste of the writ; but, since that statute, by the delivery of the writ to the sheriff. But that does not mean a mere nominal delivery, but a delivery for the purpose of carrying it into execution. Therefore, in *Bradley* v. *Wyndham*, sheriff of *Hants* (*b*), where one had delivered his writ to the sheriff on the

(*a*) Vide *Wells* v. *Pickman*, 7 *Term Rep.* 174.

(*b*) 1 *Wilf.* 44.

1804.

PAYNE *against* DREWE.

11th of *May*, who seized under it on the 14th, and no further proceedings were had, upon an expectation that the debt would be paid when the defendant's landlord came into the country; and on the 20th of the same month another writ of fi. fa. was delivered to the sheriff, which was executed, there being no person left in possession under the first execution; the first execution was deemed to be fraudulent, and the second was sustained by the Court on motion for a new trial. And the case of *Smallcomb* v. *Buckingham* (*a*) was there cited, where two writs of fi. fa. having been delivered to the sheriff by different parties on the same day, he executed the second first: and it was holden that the second execution was good and bound the goods; but that the sheriff had thereby made himself liable to the first party. If this were a question of fraud, upon a sequestration in fact executed, it might be necessary to take the opinion of the jury upon it; but here it would be altogether useless, because it is stated that the sequestration was not executed, and *Sturt* has in fact remained in possession of the goods. Therefore the sheriff was bound to have levied upon the goods; and by having taken upon him to return *nulla bona* he has made himself liable to the plaintiff.

Dampier for the defendant. No fraud is suggested or found in the case, and therefore it is not like *Bradley* v. *Wyndham* (*b*). The question here is not between the Court of Chancery and the sequestrators, but between the plaintiff, who might have remedied himself by an application to the Court of Chancery, and an officer of this Court, the sheriff, who is no party to the proceeding, but

(*a*) 1 *Salk.* 320. 1 *Ld. Ray.* 251. 1 *Wilf.* 44.

is

is put to act in a difficult situation, between the peril of paying, on the one hand, the debt and costs in this action, or, on the other, of being punished by the Court of Chancery for the contempt of its process. Under similar circumstances the Court have gone a great way to protect a sheriff; as in *Wilson* v. *Butten*, sheriff of *Essex*, *Tr.* 32 *G.*3. where the sheriff had returned a levy under a fieri facias, and an action was brought against him for the money, the Court stayed the proceedings in that action, and let him pay the money into court, he having had notice of a commission of bankrupt. Mr. *Sturt's* possession of the goods, as stated in the case, was in itself no badge of fraud, because it was consistent with the lien which the sequestrators had upon them; for the sequestration conveys no title to the goods, and they are only holden as a pledge (*a*): but goods pledged, or demised, or distrained, cannot be taken in execution. So an inchoate execution may be overthrown by relation to a previous title, though such title were not perfected before the execution commenced; as in *Cooper* v. *Chitty* (*b*), where a sheriff having levied goods on a fi. fa., after an act of bankruptcy, but before a commission sued out; and after the issuing of the commission, and assignment, by which the title of the assignees was perfected, he sold the goods; the Court held that he had done wrong, and was liable to the assignees in trover; and that he ought to have returned nulla bona. As, therefore, notice of a commission of bankrupt excuses the sheriff from levying under a fi. fa. at the suit of another, so will notice of a sequestration, which, though not an absolute transfer of the property, like the commissioners' assignment, yet may afterwards countervail the execution.

1804.

PAYNE *against* DREWE.

(*a*) *Wharam* v. *Broughton*, 1 *Vef.* 183, 4.

(*b*) 1 *Burr.* 20.

1804.

PAYNE *against* DREWE.

At common law an execution bound the goods from the teſte of the writ (*a*): ſo that though the ſheriff had ſeized under one writ firſt, he was bound to ſell under another delivered afterwards if it had a prior teſte (*b*). This, with reſpect to common law writs, was altered by the ſtatute of frauds (*c*); but it remains the ſame with regard to a ſequeſtration, which is the execution of a court of equity, and has been compared to a levari at common law (*d*). Here, then, the ſequeſtrators might at any time have deveſted the title under the ſheriff's execution. The ſheriff had no means of knowing whether the formal ceremony of laying on the ſequeſtration had taken place: nor does it appear to be the duty of ſequeſtrators to keep a viſible poſſeſſion. But though the Court of Chancery might puniſh them for not doing their duty, yet the ſheriff, who had notice of the writ, which it is found had been in fact delivered to the ſequeſtrators, could not preſume that it was void or fraudulent; and if it were valid it would relate back to the teſte (*e*). And the interval between the iſſuing and the return is in the breaſt of the Lord Chancellor and indefinite; and the order of 1803 ſhews that it was not abandoned. Even at common law the omitting a term in the return of a capias ad ſatisfaciendum does not avoid it (*f*). Then ſuppoſing the ſheriff had returned that he had taken the goods, and that they were in his hands for defect of buyers, and the ſequeſtrators had come in any time before ſale, he would have been bound

(*a*) *Anonym. Cro. Eliz.* 174.

(*b*) *Gluyas* v. *Sturmer*, *Weſtmr.* Sittings after *Michs.* 1785, cor. Lord *Mansfield* C. J.

(*c*) 29 *Car.* 2. *c.* 3. *ſ.* 16.

(*d*) Vide *The Attorney-General* v. *The Mayor of Coventry*, 1 *P. Wms.* 307.

(*e*) *Burdett* v. *Rockey*, 1 *Vern.* 58.

(*f*) *Shirley* v. *Wright*, *Salk.* 700.

by his return. Here the sheriff had notice that a sequestration had issued; that under such sequestration the goods, if they had not been, might be taken as a pledge, and that if the writ did come in it would relate back to its teste beyond his writ of fi. fa.; and that if he proceeded to a sale he could not be indemnified against the imprisonment of the Court of Chancery for a contempt of its process. [*Lawrence* J. It does not appear that the sequestration was actually laid on before the sheriff seized. Perhaps if he had applied to this Court, and stated his difficulties, it would not have compelled him to make a return till those difficulties had been cleared up. But here the sheriff has taken upon himself to act, without any such application, and has made his return, and therefore he must be bound by his own act. This distinction is taken in many cases.] He certainly might; but where goods are under a sort of inchoate title or pledge, which may become absolute by relation, the case of a commission of bankrupt, before mentioned, shews that the sheriff will be justified in returning nulla bona. [Lord *Ellenborough* C. J. asked if there were any modern case which questions the dictum that a sequestration shall bind from the teste or award of it?] No case of that sort has occurred. There is very little to be found in the books as to the nature and effect of a sequestration.

1804.

PAYNE *against* DREWE.

Cur. adv. vult.

The judgment of the Court was now delivered by

Lord ELLENBOROUGH C. J., who, after stating the case, observed, that as the order of the 17th of *January* 1803 was made long after the time when the writ of fieri facias (for the false return of which this action is brought)

1804.

PAYNE *against* DREWE.

had been returned; and as none of the facts therein ſtated were given in evidence at the trial, the matter of ſuch order could not be adverted to for any purpoſe immediately connected with this cauſe, except indeed it were in order to ſhew in what manner the Lord Chancellor had conſidered this ſame ſequeſtration in point of legal effect, when repreſented to his Lordſhip as one which had been fully acted upon, and under which the ſequeſtrators had duly entered upon the real eſtates, and ſequeſtered the perſonal eſtate. But that as this ſequeſtration, upon the facts found ſtated in this caſe to have been laid before the jury, did not appear to have been ſo dealt with, no inference could be correctly drawn from the order made in that caſe as to the effect which the Lord Chancellor would probably allow to this ſequeſtration, neglected in point of execution, as it appears upon this caſe to have been, from the moment of its delivery to the ſequeſtrators, during a period of upwards of 18 months which intervened before the writ of fieri facias upon which the preſent queſtion ariſes was in fact delivered to the ſheriff of *Dorſet*. His Lordſhip then proceeded—

The queſtion in this caſe is, Whether *the exiſtence* of a writ of ſequeſtration, founded upon a commiſſion to certain ſequeſtrators therein named, and which writ had been *delivered to the ſequeſtrators* about 18 months before the writ of execution at common law againſt the goods was delivered to the ſheriff of *Dorſet*, but upon which writ of ſequeſtration nothing was done by the ſequeſtrators, nor any notice thereof given by them or their party to the ſheriff, *be an excuſe in point of law* to ſuch ſheriff for not executing the writ of *fieri facias* ſo to him delivered, but inſtead thereof, returning *nulla bona*, as he has done? The competency of this excuſe depends on the nature and effect

effect of a sequestration awarded, as this appears to have been, by the Court of Chancery, for the non-performance of a personal duty. Upon the proper nature and effect of such a sequestration, and also of sequestrations to compel appearance, answer, and the like, there is some degree of apparent uncertainty in many of the Chancery cases, (vide *Eq. Ca. Abr.* tit. *Sequestration*, and *Dickens' Chancery Cases*, vol. 1. p. 31. 106. 130. 135. 325. 335. 354. 388., and vol. 2. p. 472. 576. 624. 638. 711.) But as we shall, for the purpose of the present question, assume that the award of the sequestration had the same obligatory effect as the award of a writ of execution against the goods would now have at the common law, and shall even further assume, upon the authority of what was said by the Lord Chancellor *Nottingham*, in *Burdett* v. *Rockley*, 1 *Vern.* 58. (although it is the only case we have found which goes so far) "*that a sequestration binds from the very time of awarding the commission, and not only from the time of executing of it and its being laid on by the commissioners;*" in which respect it is put upon the footing of an execution at common law, before the statute of frauds, and which execution at common law then related to the teste or award of the execution; I say, thus considering the effect of a sequestration for the purpose of this question, (and in so considering it we allow it the most extensive effect which can possibly be claimed on its behalf), it still does not appear to us that the sequestration in question did, under the circumstances, afford a sufficient excuse to the sheriff for not executing the writ of fieri facias at the suit of the plaintiff. The sheriff is not excused, if the sale he was required to make under the fieri facias would, if made, have been a valid and effectual one in favour of his vendee. And, if he would not, by making such sale thereunder,

1804.

PAYNE *against* DREWE.

1804.

Payne *against* Drewe.

under, have subjected himself either to the action of the party interested in the sequestration, or to the punishment of the Court of Chancery as for a contempt of its process. Whether the sale he would have made, supposing he had sold under the fieri facias, would have been a valid and effectual one depends upon the sense in which, and the extent to which, goods shall be considered as *bound* by the award of an execution before the statute of frauds and by the delivery of the writ of execution since that statute. The sense in which, and extent to which, goods are in either case said to be *bound* is, that it binds the property as against the party himself and all claiming by assignment from, or representation through or under him; but it does not so vest the property in the goods absolutely, as to defeat the effect of a sale thereof made by the sheriff under an execution. This was settled in the case of *Smallcomb* v. *Cross* and *Buckingham and another*, sheriffs of *London*, (1 *Ld. Raym.* 252. S. C., 1 *Salk.* 320., and *Comyns*, 35.) That was the case of a sale by the sheriff under a second writ of fieri facias, the former fieri facias, which was first delivered to the sheriff, not having been then executed. And it was an action of trover brought by the plaintiff in the last delivered fieri facias, which was so first executed, against the sheriffs, and the plaintiff in the first delivered fieri facias, which was executed by the sheriff, and the goods sold again, after the goods had been already sold under the last delivered writ. Lord *Holt*, in delivering the judgment of the Court for the plaintiff (according to the report in *Comyns*, which agrees with the other reports of the same case), "declared their reason "to be, for that at common law, if there were two writs "of fieri facias, the one bearing teste on such a day, and "the other on the next day, and the last writ was first "executed,

1804.

PAYNE *against* DREWE

" executed, *such execution should not be avoided*, and the " party had no remedy but against the sheriff; for the " sheriff ought to make execution at his peril; and the " sheriff shall be excused if there was no default in him: " as if he who took the first writ out conceals it in his " hand, the sheriff may rightly make execution on ano- " ther writ which bears the last teste, but came first to " his hands. And it hath been held, that if a recogni- " zance be extended, the executor ought to satisfy that " before a judgment which is not prosecuted; and there- " fore, in the present case, as he who brought his fieri " facias to the sheriff did not desire that it might be exe- " cuted, the sheriff might rightly execute the last fieri " facias, *and such execution shall not be avoided.*" All the reports of this case agree that although in general the sheriff was *bound to execute* that writ first that was first delivered, yet that if he do otherwise, and execute the last delivered first, *that the property of the goods is bound by the sale, and the party cannot seize them by virtue of his execution first delivered*, but may have his remedy against the sheriff. And the reason given in *Ld. Raym.* 252. is, " *For sales " made by the sheriff ought not to be defeated; for if they are, " no man will buy goods levied upon a writ of execution.*" Other cases to the same effect are to be found in 10 *Vin. Abr.* 566. tit. *Execution*, A a., and also *Comb.* 145., where it is said by *Holt* C. J. and *Dolben* J. " That the statute of " frauds, which says that the property of goods taken in " execution shall be bound only from the delivery of the " writ to the sheriff, and not from the teste thereof, is to " be understood only in respect of purchasers of them." And in *Lowthal* v. *Tonkins*, 2 *Eq. Cas. Abr.* 381. Lord *Hardwicke* construes the meaning of the words " bound " from

Words of Lord *Raym. Rep* 252.

1804.

PAYNE *against* DREWE.

"from the delivery of the writ to the sheriff" in the same manner; for he says, "The meaning of the words that "the goods shall be bound from the delivery of the writ "to the sheriff is, that after the writ delivered, *and the "defendant makes an assignment of them*, except in market "overt, the sheriff may take them in execution." And in a former part of the same case, Lord *Hardwicke* says, "Neither before this statute nor since is *the property of "the goods altered, but continues in the defendant till the "execution executed*." And what Lord *Holt* is made in the case of *Lechmere* v. *Thorowgood*, *Comb.* 123., to say, viz. "*That the property of the goods is vested by the delivery "of the fieri facias*, and the extent afterwards for the "king comes too late, and that on the statute of frauds "and perjuries," cannot be correctly stated, as it would be contrary to what Lord *Holt* is reported by the same reporter to have said only the term following in p. 145., and also to what he is reported by so many reporters to have said in *Smallcomb* v. *Cross*. The comparative accuracy of *Comberbatch* as a reporter may be judged of by referring to his short report of that case under the name of *Smallcorn* v. *Vic. Lond. Comb.* 429., in which report the facts, point, and names of parties are all mistated. Lord *Mansfield*, in *Cooper* v. *Chitty*, 1 *Burr.* 36., commenting upon the great inaccuracy of *Comberbatch*, says he must be mistaken, for Lord *Holt* could never say what he above supposes him to have said, (that is to say, in *Lechmere* v. *Thorowgood*, p. 123.) Lord *Kenyon*, indeed, in 4 *T. R.* 411. in commenting on Lord *Mansfield*'s supposed observation, thinks it as likely that the report of Lord *Mansfield*'s observation should be mistated as that *Comberbatch* should have been mistaken in reporting Lord *Holt*'s opinion;

and

1804.

PAYNE *against* DREWE.

and ſays, "that as by the common law, abridged as it "was by the ſtatute of frauds, *the property of the debtor's* "*goods was bound by the delivery of the writ to the ſheriff,* "*there then remained no property in the debtor,* on which "the prerogative of the Crown could attach." Lord *Kenyon* cites, in ſupport of his opinion, as to the abſolute veſting of the property by the delivery of the writ, no authority but that of *Comberbatch's* report of what was ſaid by Lord *Holt;* which report of *Comberbatch* is the more unworthy of attention and credit on that point, for the reaſon already given as to Lord *Holt's* opinion on that very ſubject, as reported by other contemporary and better reporters of the caſe of *Smallcomb* v. *Croſs and others,* and by whoſe concurrent teſtimony it muſt be conſidered as ſufficiently verified. And, indeed, what fell from Lord *Kenyon* on this point was not neceſſary to the caſe then before the Court: for there was not a *mere delivery* of a writ of execution in that caſe, but the ſheriff had *actually ſeized under it;* and the queſtion was, Whether that were ſufficient to defeat the extent of the Crown as to the goods ſo ſeized? So that the point, how far goods *were bound,* and the property veſted in the execution creditor as againſt all the world, and for all purpoſes, *by the delivery* of a writ of execution, never aroſe in that caſe before Lord *Kenyon,* and therefore it was ſo far extrajudicially ſaid by his Lordſhip. Aſſuming, therefore, upon theſe authorities of Lord *Holt* and Lord *Hardwicke,* and particularly on the authority of the caſe of *Smallcomb* v. *Croſs,* &c. as decided by Lord *Holt,* and which has been generally received and referred to as the eſtabliſhed law on the ſubject, that the ſheriff could have made a valid and effectual ſale in this caſe: the next queſtions are, Would he, by executing the writ of fieri facias, have ſub-

1804.

PAYNE *against* DREWE.

jected himself to the action of the party to the sequestration, or to punishment by the Court out of which it issued? As to the first of these questions, it is certainly to be answered in the negative. What pretence of complaint can he have against the sheriff who gave no notice of that process in deference to which the sheriff was to forbear to levy, which he might easily have made available by ordinary diligence, and who took no steps for 18 months to make it so? *vigilantibus non dormientibus leges subveniunt*. If he did not enforce it during that period, at what period was it to be expected that he would do so? The commission extends to Mr. *Charles Sturt*'s goods not in the bailiwick of one sheriff only but throughout the whole realm. Were all his Majesty's subjects to hold their means of remedy against the personal estate of Mr. *C. Sturt*, in whatever county they might be found, in suspence and abeyance till the parties to the sequestration should think fit to avail themselves of theirs? But it would be impossible, upon the state of facts disclosed in this case, for the parties interested in the sequestration or the sequestrators to prove such notice of their sequestration as it would be necessary to aver in their declaration; for the communication made by Mr. *C. Sturt* himself of the fact of a sequestration being pending against himself certainly would not enure as a sufficient notice on the behalf of those who had issued such a dormant process against him; and an adverse creditor was surely not bound merely on such an intimation to believe the fact even of the sequestration having issued; and still less to believe, against every reasonable presumption of fact to the contrary, arising from its entire non-execution, that the sequestration was yet in full force, and capable of being and meant to be still proceeded upon. As to the light in which the Court of Chancery would view an execution at common law, executed

1804.

PAYNE *against* DREWE.

cuted under these circumstances; the contempt, if any, which that Court would probably animadvert upon would be a contempt of its own process by those who had procured it to be awarded, and the commissioners who were empowered, and who, instead of putting it in force, suffered it to become the means of protection to him against whom it was granted and required to act under it. As against these parties, and also against Mr. *C. Sturt*, the defendant in the execution, the sheriff, may, if he can make out a case of collusion between them, yet perhaps be able to obtain some relief by the intervention of that Court in his favour. That protection and a full indemnity he might have had for asking for in the first instance from that Court: or this Court would, upon his application, have enlarged the rule upon him to return the writ of fieri facias, unless the plaintiff would have indemnified him against the sequestration: so that if he now stand unprotected against the action of the plaintiff, it is by his own neglect that he does so. In order to found a contempt of the Court, it would not, perhaps, be necessary that the sheriff should have had actual notice of the award of the sequestration, although that circumstance may be a necessary ingredient in the action of the party. By 3 *P. Wms.* 116. Mr. *Herbert's* case, the marrying a ward of the Court may be a contempt, though the parties concerned in the marriage had no notice that the infant was a ward of the Court. But if every person be bound to take notice of the proceedings, and so to know that the sequestration had been awarded, they ought at the same time to have the benefit of a presumed knowledge that it had not been acted upon, so as to have become entitled to be considered as virtually abandoned and waved by the parties originally interested in its execution. Although

1804.

PAYNE *against* DREWE.

though a writ of sequestration be not returnable at a day or term certain as a writ of fieri facias is, nor is any precise time limited for its execution, yet it requires the sequestrators, at certain proper and convenient days and hours, (which may be understood perhaps as within a reasonable time, although it more obviously and naturally seems to mean at seasonable hours in the day for such purposes) to enter upon the lands, &c. and to collect rents, and to take into their hands his goods and chattels. The case of *Hutchinson* and *Johnson*, 1 *T. Rep.* 729., in which it was holden that where two writs of fieri facias against the same defendant are delivered to a sheriff on different days, and no actual sale of the defendant's goods is made, that the first execution must have the priority, may be supposed, on the first view of it, to lay down a doctrine somewhat contrary to what has been already stated: but that case appears to me to decide only that where two writs of fieri facias are delivered to the same sheriff, he must, as between himself and the several plaintiffs in those executions, sell under that writ which is first delivered, although he may have first seized under the last delivered writ. But in the present case there are different writs or authorities, each so far binding the goods as to warrant a sale under them, one delivered to the sheriff, and another previously delivered to other persons, equally competent with the sheriff to have seized under them. And the question is not which of two writs, equally *mandatory* to *the same* person, shall have a priority in point of execution by him, but whether one writ mandatory to the sheriff for one purpose shall remain in his hands wholly suspended in point of execution, merely because other persons having a similar competent authority under other process of another Court to them directed have chosen

to

1804.

PAYNE *against* DREWE.

to neglect the execution of such last-mentioned process: which brings the question nearly to this, namely, Whether a writ which is from the delivery immediately binding as against the defendant, so as to tie up his hands from alienating the goods which might be seized under it, is to be regarded as in effect self-executed by its own proper legal effect and force for all purposes? That it is not, the case of *Smallcomb* v. *Buckingham* decides; for if it were so, then any sale made by the sheriff under a second execution, when he had a former one in his hands, would be a nullity in respect even to the sheriff's vendee thereof, which would directly contradict what was established in that case. It appears to me therefore not to be contradictory to any cases, nor any principles of law, and to be mainly conducive to public convenience, and to the prevention of fraud and vexatious delay in these matters, to hold *that where there are several authorities equally competent to bind the goods of a party when executed by the proper officer, that they shall be considered as effectually and for all purposes bound by the authority which first actually attaches upon them in point of execution, and under which an execution shall have been first executed.* In this case, being of opinion that the sheriff would not, by executing the writ of execution to him directed, have subjected himself either civilly or criminally to any inconveniences, we think that he ought to have done so; and not having done so, he has made himself liable to this action, in which we are of opinion that the plaintiff is entitled to recover.

Postea to the Plaintiff.

1804.

Wednesday, Feb. 8th.

BEALE *against* THOMPSON.

A foreign prince, under pretence of precaution against a supposed act of aggression of our Government, made a hostile seizure of *British* ships in his ports, and imprisoned our seamen on shore, and after six months they were released, and they resumed and concluded their voyage, and the owners received their freight: held that such seizure, however hostile in the manner, so far partook of the nature of an *embargo* in its result, and not of *a capture*, that it did not put an end to the contract of a mariner for wages even during the time of such detention and imprisonment. But even considering it as a temporary capture, yet, like the case of a capture and recapture, the mariner was still entitled to his wages; for a mariner's title to wages depends on the ship's earning her freight for the voyage, and the performance of his stipulated duty; and here freight for the voyage was ultimately earned, and the mariner was guilty of no breach of duty; for his stipulation *not to be on shore under any pretence, without leave, before the voyage was ended*, must be understood of a being on shore *by the party's own unauthorized act*. And even if such imprisonment on shore could be so considered, yet the master having afterwards received him again on board without objection amounted to a dispensation of the service in the interval, and entitled him to wages according to his original contract.

IN assumpsit for wages by a mariner, he declared that in consideration that he would enter into the service of and serve the defendant, then the owner of the ship *Acquilon*, as a mariner and ship's cook on board the same, bound on a voyage *from* Hull *to* Petersburgh, *and from thence to* London, at the wages of 5*l.* 10*s.* per month, the defendant promised to pay him such wages *from the time of his entering into such service until the final end and completion of the said voyage*: The plaintiff then averred that he did enter and was received into the defendant's service, and sailed in the said ship on the voyage from *Hull* to *Petersburgh*, and afterwards returned from thence to *London*, where the ship arrived safe and completed her intended voyage; and that *during the whole of the said voyage* he the plaintiff *continued and remained in and on board the said ship in the service of the defendant as such mariner and ship's cook* as aforesaid, by means whereof, &c. the defendant became liable to pay him 64*l.* 14*s.*, being at the rate of 5*l.* 10*s.* per month from the time when he entered the said service to the time when the voyage was so completed. In the second count the averment was that the plaintiff *continued and remained in the service of the defendant* as such owner of the said ship, on board the same, *without having ever abandoned or deserted the said ship*. The third count was upon a general indebitatus assumpsit for

wages

wages on the voyage, and the fourth on a quantum meruit for wages, with other common counts; concluding with the plaintiff's request of the defendant to pay, and the defendant's refusal. Plea non assumpsit. The cause was tried before Lord *Alvanley* at the sittings at *Westminster* after *Michaelmas* term 1802, when a special verdict was found, stating in substance as follows:

The plaintiff, a *British* seaman, on the 8th of *September* 1800, signed articles to serve as a seaman in a *British* ship called the *Acquilon*, of which the defendant was owner, at the wages of 5*l.* 10*s.* per month, on a voyage from *Hull* to *Petersburgh*, and from thence to *London*; and that in consideration of the said monthly wages the plaintiff should and would perform the above-mentioned voyage. And the defendant did hire the plaintiff as a seaman for the said voyage at such monthly wages, to be paid pursuant to the laws of *Great Britain*. And the said plaintiff did promise and oblige himself to do his duty and obey the lawful commands of the officers on board the said ship, or boats thereunto belonging, as became a good and faithful seaman and mariner; and at all places where the said ship should put in or anchor at during the said ship's voyage to do his best endeavour for the preservation of the said ship and cargo, and not to neglect or refuse doing his duty by day or night, nor should go out of the said ship on board any other vessel, *or be on shore under any pretence* whatsoever till the voyage was ended and the ship discharged of her cargo, *without leave* first obtained of the master, captain, or commanding officer on board; and in default thereof he should be liable to the penalties mentioned in the acts of the 2 *Geo.* 2. *c.* 36. and the 37 *Geo.* 3. *c.* 73.; and that 24 hours' absence without leave should be deemed a total desertion, and ren-

1804.

BEALE *against* THOMPSON.

der the plaintiff liable to the forfeitures and penalties contained in the acts above recited: and further, that the plaintiff should not demand or be entitled to his wages, or any part thereof, until the arrival of the said ship at the above-mentioned port of discharge. And that if the plaintiff should well and truly perform the above-mentioned voyage he should be entitled to the wages or hire that might become due to him pursuant to the said articles. The plaintiff sailed on board the said ship, which arrived at *Petersburgh* on the 18th of *October* 1800, and continued there in prosecution of the purposes of the voyage until the 5th of *November*, on which day the following order was issued by the *Russian* Government: "Whereas we have learned that the island of *Malta*, lately in the possession of the *Herculc*, has been surrendered to the *English* troops; but as it is yet uncertain whether the agreement entered into on the 30th of *December* 1798 will be fulfilled, according to which this island, after its capture, is to be restored to the order of *St. John* of *Jerusalem*, of which his Majesty the Emperor of all the *Russias* is Grand Master; his Imperial Majesty, being determined to defend his rights, has been pleased to command that an embargo shall be laid on all *English* ships in the ports of his empire until the above-mentioned convention shall be fulfilled." In consequence thereof guards were placed along the shore to prevent the crew from escaping from their respective ships, until the 10th of the same *November*, when such part of the crew of each ship as were *British* subjects were taken out by a *Russian* guard and marched into the interior of the country. On the 18th and 21st of the same month the following proclamation appeared in the *Petersburgh* Court Gazette: "The crews of two *British* ships in the har-

 bour

bour of *Narva*, on the arrival of a military force to put them under arreſt in conſequence of the embargo laid on them, having made reſiſtance, fired piſtols, and forced a *Ruſſian* ſailor into the water, and afterwards weighed anchor and ſailed away; his Imperial Majeſty has been pleaſed to order that the remainder of the veſſels in that harbour ſhall be burned. His Imperial Majeſty, having received an account of the taking of *Malta*, has been pleaſed to direct that the following note ſhall be tranſmitted to all the Diplomatic Corps reſiding at his court, &c. His Majeſty the Emperor of all the *Ruſſias* has received circumſtantial accounts reſpecting the ſurrender of *Malta*, by which it is actually confirmed that the *Engliſh* Generals, notwithſtanding the repeated remonſtrances on the part of his Majeſty's Miniſters at *Palermo*, as well as from the Miniſtry of his *Sicilian* Majeſty, have taken poſſeſſion of *Valetta* and of the iſland of *Malta* in the name of the King of *Great Britain*, and have hoiſted his flag only; his Imperial Majeſty's juſt indignation having been raiſed by this violation of good confidence, he has reſolved not to take off the embargo that has been laid on all *Engliſh* veſſels in the *Ruſſian* ports, until the agreement of the convention concluded in 1798 ſhall have been completely carried into execution" On the 14th of *January* 1801 the King in Council iſſued the following order: "Whereas his Majeſty has received advice that a a large number of veſſels belonging to his Majeſty's ſubjects have been and are detained in the ports of *Ruſſia*, and that the *Britiſh* ſailors navigating the ſame have been and now are detained as priſoners in different ports of *Ruſſia*; and alſo that, during the continuance of theſe proceedings, a confederacy of an hoſtile nature againſt the rights and intereſts of his Majeſty and his dominions has

1804.

BEALE *againſt* THOMPSON.

1804.

BEALE *against* THOMPSON.

been entered into with the Court of *Saint Peterſburgh*, by the Courts of *Denmark* and *Sweden*, reſpectively; it is hereby ordered that no ſhips or veſſels belonging to any of his Majeſty's ſubjects be permitted to enter and clear out for any of the ports of *Ruſſia*, *Denmark*, or *Sweden*, until further order. And his Majeſty is further pleaſed to order that a general embargo or ſtop be made of all *Ruſſian*, *Daniſh*, and *Swediſh* ſhips and veſſels whatſoever, now within or which hereafter ſhall come into any of the ports, harbours, or roads within the United Kingdom, &c. together with all perſons and effects on board the ſaid ſhips and veſſels, but that the utmoſt care be taken for the preſervation of all and every part of the cargoes on board any of the ſaid ſhips and veſſels, ſo that no damage or embezzlement whatever be ſuſtained," &c. On the 16th of *January* 1801 the King in Council iſſued the following order: "Whereas his Majeſty has received advice that a large number of veſſels belonging to his Majeſty's ſubjects have been and are detained in the ports of *Ruſſia*, and that the property of his Majeſty's ſubjects in *Ruſſia* has, by virtue of ſeveral orders and decrees of the *Ruſſian* Government, particularly one, bearing date the 29th of *November* laſt O. S. (correſponding with the 10th of *December* N. S.) been ſeized and directed to be applied, in violation of the principles of juſtice and of the rights of the ſeveral perſons intereſted therein; it is hereby ordered, that no bills drawn ſince the ſaid 29th of *November* laſt O. S., by or on behalf of any perſons, being ſubjects of or reſiding in the dominions of the Emperor of *Ruſſia*, ſhall be accepted or paid, without licence from one of his Majeſty's Principal Secretaries of State firſt had in that behalf, until further ſignification of his Majeſty's pleaſure, or until proviſion ſhall be made in reſpect there-

of

of by act of parliament; whereof all persons concerned are to take notice and govern themselves accordingly." The captain and crew of the *Acquilon*, including the plaintiff, remained up the country till the 28th of *May* in the succeeding year, during which time they were kept within certain bounds, and from the time they were taken from their ship were treated in other respects as if they had been prisoners of war. On the 28th of *May* in the succeeding year the captain and crew were marched back to *Petersburgh*, and returned on board the ship, and afterwards proceeded on the voyage to *London*. The ship went out to *Petersburgh* in ballast to bring a cargo to *London*, and was to be paid freight for that cargo by the ton. The plaintiff did his duty as a seaman on board the ship during the said voyage, and the ship received the same freight as if she had not been detained, and no more. After the captain and crew returned on board the ship the *Russian* Government issued an order, wherein, after stating that the intention of the Emperor of *Russia* (a) to render full and entire justice to the *British* subjects who had sustained losses during the interruption of the good understanding between *Great Britain* and *Russia* had been already shewn by his acts, it is declared, "Que tous les navires, les marchandizes, et les proprietés des sujets *Britanniques* qui avaient été mis en sequestré sous le dernier regne en *Russie* seront non seulement fidèlement restitués aux dits sujets *Britanniques*, ou à leur commettans, mais que pour les effets qui auraient été alienés d'une maniere quelconque, et qui ne pourraient plus être rendus en nature, il sera accordé aux proprietaires un équivalent convenable, lequel sera determiné ulterieurement d'après les

1804.

BEALE *against* THOMPSON.

(a) The Emperor *Paul*, who issued the prior orders, had died in the mean time, and was succeeded by the Emperor *Alexander*.

1804.

BEALE *against* THOMPSON.

regles de l'équité," &c. dated the 5/17 *June* 1801. This order has not yet been carried into complete effect. No new articles were entered into between the captain and crew. The plaintiff has received all his wages for the voyage according to the articles of 5*l.* 10*s.* per month, except for the time the captain and crew were so kept out of the said ship. But whether, &c.

The Court of Common Pleas (*a*) were equally divided in opinion upon this case; but one of the learned Judges, who thought with the plaintiff, assented to judgment being given for the defendant, to enable the plaintiff to bring a writ of error if he thought proper. And accordingly a writ of error was brought in this Court against such judgment. And the same course was taken with respect to another case of *Johnson* v. *Broderick*, aftermentioned (*b*); which came on to be argued at the same time; which only differed from the present inasmuch as there the plaintiff was a *foreign* instead of a *British* seaman. Both the cases were argued by *Lens* Serjt., for the plaintiff, and by *Gibbs* for the defendant *Broderick*, and *Gaselee* for the defendant *Thompson*.

For the plaintiff it was argued, that the conduct of the *Russian* Government partook more of the nature of an embargo than of a hostile capture, and that the result at least stamped it with the former character. And if it were an embargo, then it was clearly no discontinuance of the original contract for the mariner's wages, within the principle of *Hadley* v. *Clarke* (*c*), where an embargo by our own Government was holden not to dissolve a contract for the freight of goods, even after a duration of two years. [Upon that part of the argument, whether this

(*a*) 3 *Bos.* & *Pull.* 405. (*b*) Post, (*c*) 8 *Term Rep* 259.

were

1804.

BEALE *against* THOMPSON.

were to be taken as an embargo or a hostile capture pro tempore, the same arguments and authorities were used and adverted to as in the case of *Thompson* v. *Rowcroft* (*a*), which arose out of the same transaction, and are therefore unnecessary to be here repeated.] But, 2dly, it may be urged that the effect of the seizure, though only quousque and not absolute, being to prevent the plaintiff from performing his services as a mariner during the period of his imprisonment, he is not entitled to recover on that ground. But even in case of a capture, if it be followed by recapture, the original contract for mariners' wages still subsists, according to *Molloy*, *b.* 2. *c.* 4. *s.* 13. (*b*). and though Lord C. J. *Eyre*, in *Curling* v. *Long* (*c*) seemed to think otherwise, yet none of the other Judges supported that opinion; and at all events it will not apply to the case of an embargo. The cases of capture and ransom, as *Chandler* v. *Meade* (*d*), and *Yates* v. *Hall* (*e*), are very distinguishable; for there the ransom operates as a new purchase, and consequently there must be a new contract for wages with the purchaser. But here if the voyage were not determined by the hostile embargo the plaintiff may be said to have continued virtually in the service of the defendant all the time he was in prison; there being no pretence for saying that he passed into any other service, as in the case of the impressed man. *Wiggins* v. *Ingleton* (*f*). It was in his character of mariner that he became the object of detention. There is no necessity for an actual service during the whole voyage; there are necessarily many implied exceptions in such a contract,

(*a*) *Ante*, 34.

(*b*) *Lawrence* J., on the argument of the second case, referred to Lord *Eldon*'s opinion to this purpose in *Bergstrom* v. *Mills*, 3 *Esp. N. P. Cas.*, 36.

(*c*) 1 *Bos. & Pull.* 637.

(*d*) Cited, 2 *Ld. Ray.* 1211.

(*e*) 1 *Term Rep.* 73.

(*f*) 2 *Ld. Ray.* 1211.

1804.

BEALE *against* THOMPSON.

contract, as sickness, rest, and the like. In *Chandler* v. *Greaves* (*a*) the plaintiff recovered his wages as a mariner for the whole voyage, though he was obliged, in the middle of it, to be put on shore and left there on account of an accident which disabled him from doing duty. And it seems sufficient if the party performed all that he was called upon to perform, or that there was any reasonable necessity for his performing. If the mere inability to perform the functions of a mariner in any respect be a ground for considering the contract between him and the owner as dissolved, it would apply as well to the case of a simple embargo, and that even for a day; for there is as much a force imposed on the mariner to prevent his navigating the vessel in the one case as in the other. And yet this consequence is not pretended to arise in that case. But there can be no difference in the legal effect, whether the imprisonment be on board the ship or on shore. In *Blight* v. *Page* (*b*) a ship owner recovered freight by the direction of Lord *Kenyon*, though the freighter, owing to the embargo of a foreign Government, was not able to ship the cargo on board for which he had hired the vessel. And the case of *Pratt* v. *Cuff* (*c*), before Lord *Kenyon*, is an authority in point that a temporary hostile embargo, accompanied with the imprisonment of the mariners, is no bar to their recovering their full wages during such imprisonment. And here there is the less reason why it should, because it is found that the whole freight, which is the mother of wages, had been earned and received by the defendant.

For the two several defendants it was insisted, first, that the act of the *Russian* Government was a hostile

(*a*) 2 *H. Blac.* 606. note.

(*b*) 3 *Bos.* & *Pull.* 295. note.

(*c*) Cited *ante*, 43.

seizure

1804.

BEALE *against* THOMPSON.

ſeizure and temporary capture, for the reaſons before ſtated (*a*), which put an end to the original contract for wages, and left the mariner to his remedy upon a quantum meruit for the ſervices actually performed. But, ſecondly, whether it were a capture or only an embargo, or a middle caſe, yet the effect of it having been to diſable the plaintiff from performing his contract, he was not entitled to recover. The declaration contains ſpecial and general counts. The one ſet ſtate a ſpecial agreement, by which the maſter contracted with the mariners for certain wages for certain ſervice to be performed by them. The performance of that ſervice then is a condition precedent, which muſt be averred, before the claim to wages can ariſe, or at leaſt ſuch ſpecial circumſtances ſtated as will, in point of law, excuſe the performance. And accordingly it is there averred that the ſervices were in fact performed by the plaintiff, during the whole voyage. But the facts ſtated in the ſpecial verdict negative that averment; for they ſhew that during a conſiderable period of the time for which the wages are ſought to be recovered the maſter was out of poſſeſſion of his veſſel, and the crew were all marched up the country under a guard and detained there as priſoners. The queſtion then is, Whether any ſufficient excuſe be ſhewn for the non-performance of the ſervice in fact, which will enable the plaintiff to recover under the general counts? The excuſe ſtated is, that a foreign power forcibly prevented the plaintiff from doing it. But this was not through any default of the defendant, the other contracting party. The force operated in invitum as well againſt him as againſt the plaintiff. It is indifferent in this view whether it operated as an extinguiſhment or only as a ſuſpenſion of the con-

(*a*) *Ante*, 34.

tract:

1804.

BEALE *against* THOMPSON.

tract: it is enough for the purpose of this inquiry that in fact the plaintiff did not perform his stipulated service, and that without the default of the defendant. The force imposed on the parties would have been a reasonable excuse in an action against the plaintiff for the non-performance of his service as a mariner; and it must be equally so for the owner's not paying for that which he never received; the excuse, if any, must be reciprocal. Nothing less than the act of God intervening between the contract and the performance will excuse either party omitting to perform his part of it, as in case of sickness or the like. But it is said that these arguments apply also in part to the case of an embargo; and *Hadley* v. *Clarke* (a) is relied on: but the distinction is clear between the two cases. That was an embargo laid on by our own Government; and it is an implied exception in every contract that it shall not contravene the acts of the state. But further, in the case of a common embargo *the relation of master and mariner* continues during the whole time, though the full extent of the services may be restrained. The ship is left in the possession of the master and crew, and the latter are bound to obey all the master's orders on board the ship, except that of breaking the embargo and putting to sea. Whereas here the ship was under another control, and the master could neither give nor the mariners obey any order whatever. Nothing can be argued from the receipt of freight in this case, for that the defendant was at all events entitled to, either under the original contract or under an implied contract for the service in fact performed in carrying the goods; and the quantum of freight to be received depends not on the duration of the voyage, but on an entire contract for a certain sum. The question

(a) 8 *Term Rep.* 259.

in

1804.

BEALE *against* THOMPSON.

in this cafe, therefore, which is upon the earning of wages during the intermediate time of the imprifonment, could never arife. Here the claim is upon a contract for wages at fo much *per month*, the quantum of which depends upon the quantum of fervice performed. Admitting that freight and wages are commenfurate, the queftion would be, Whether the owner were entitled to *demurrage* at fo much a-day during the whole time of the detention? This cafe is alfo diftinguifhable from that of *Blight* v. *Page* (*a*); for there the plaintiff did not rely on the act of the foreign Government to excufe the non-performance of his contract, as here; but he having done in fact every thing which he had undertaken to do towards earning his freight, was holden entitled to receive it, though by the act of the foreign Government the defendant was prevented from availing himfelf of the benefit of the plaintiff's performance: and fuch act of foreign force was confidered to be no excufe to the defendant for not having performed his part. The only cafe then which at all bears upon the defendant is that of *Pratt* v. *Cuff* (*b*), but that was only a decifion at Nifi Prius; and to that the opinion of Lord C. J. *Eyre* in *Curling* v. *Long* (*c*) may be oppofed. And it does not appear how the freight was referved there; and if referved by time, as the wages are here, and the owner had received his whole freight, including the time when the veffel was detained, the mariner might have recovered on an equitable confideration of the cafe.

(*a*) Sittings at *Guildhall* after *Michaelmas* term 1801, cor. Lord *Kenyon* C. J. cited in *Touteng* v. *Hubbard*, 3 *Bof. & Pull.* 295.

(*b*) *Ante*, 43. (*c*) 1 *Bof & Pull.* 637.

1804.

BEALE *against* THOMPSON.

In reply it was obferved, that the cafe of *Hadley* v. *Clarke* did not proceed upon the ground of a diftinction between *domeftic* and *foreign* embargoes. That the principle and policy of the thing extended equally to both. For as, on the one hand, it would be highly injurious to mafters of fhips, if an embargo laid on in a foreign country put an end to the contracts with the mariners, fo as to enable them to impofe new terms upon him for navigating the fhip home; fo it would be equally detrimental if fuch a circumftance could warrant the mafter in leaving the crew in a foreign country, and hiring other feamen to bring the veffel home. That it did not follow that every lawful excufe for non-performance of a contract muft be reciprocal; for otherwife *Chandler* v. *Greaves* could not be law. That admitting that the feizure might have terminated in hoftilities, in which cafe it would have become a capture, as in the cafe of the fhips taken by Lord *Keith* at the *Cape* (a), yet the event ftamped it with the character of an embargo; and that, by all the authorities, did not put an end to the contract for freight or wages.

Cur. adv. vult.

Lord ELLENBOROUGH C. J. now delivered judgment.

This is a writ of error depending in this Court upon a judgment in *C. P.* given for the defendant, in an action of affumpfit brought by the plaintiff, late a mariner and fhip's cook on board the fhip *Acquilon*, againft the defendant as owner of that fhip, to recover his wages at the rate of 5*l.* 10*s.* per month, claimed to be due to him from the time of entering into fuch fervice, during the whole period of a voyage from *London* to *Peterfburgh*, and up to the time of

(a) *Gertruyda* cafe, 2 *Rob. Adm. Rep.* 211.

his

1804.

BEALE *against* THOMPSON.

his return from *Peterſburgh* back to *London*. The plaintiff avers in the firſt count of his declaration that the ſhip performed her voyage out to *Peterſburgh* and back to *London*, and that during the whole of the voyage he continued and remained in and on board the ſaid ſhip in the ſervice of the defendant, as ſuch mariner and ſhip's cook, and in virtue of ſuch ſervice claims to be entitled to pay at the rate of 5*l.* 10*s.* per month from the time when he entered into ſuch ſervice to the time when the voyage was completed. The ſecond count is nearly the ſame as the firſt, only that in the ſecond the plaintiff avers that he continued in the defendant's ſervice on board *without having ever abandoned or deſerted the ſhip*. To this declaration the defendant pleaded the general iſſue; and upon the trial before Lord *Alvanley* a ſpecial verdict was found; (the ſubſtance of which his Lordſhip here ſtated).

This caſe, in the diſcuſſion which it has undergone in the Court of *C. P.* and upon the arguments here, has been treated as principally depending on this queſtion, Whether the acts done on the part of the *Ruſſian* Government, and by which the relative ſituation, rights, and intereſts of the parties are ſuppoſed to have been affected, were to be conſidered as in effect amounting to an *actual capture* of the ſhip and cargo, or only to a *temporary embargo* thereupon? It has been aſſumed on all ſides that the effect of capture is to diſſolve the contract, both for freight and wages, between the reſpective parties thereto. Whether ſuch may or not be the effect of *capture*, when it is not merely inchoate but perfect and conſummate, and where the right of the original proprietor is not veſted by any ſubſequent recapture, nor ſuch right recogniſed as ſtill legally in force and continuing by any judgment or authoritative act of reſtitution on the part of the capturing

1804.

Beale against Thompson.

nation subsequent to the seizure, it is not necessary upon this occasion for us to decide. Lord *Mansfield*, in *Hamilton* v. *Mendes*, 2 *Burr.* 1198. says, "In case of a recapture the jus postliminii continues for ever." That, he says, is by the statute law of this country. But *Molloy*, *b.* 2. *c.* 4. *s.* 13. lays down generally, that if a ship in her voyage happen to be taken by an enemy, and afterwards in battle be retaken by another ship in amity, and restitution be made, and she proceed in her voyage, the contract is not determined. Though the taking by the enemy divested the property out of the owners, yet by the law of war that possession was defeasible, and being recovered in battle afterwards, the owner became reinvested: so the contract by fiction of law became as if she had never been taken; and so the entire freight becomes due. And Lord *Eldon*, in the case of *Bergstrom* v. *Mills*, (as reported in 3 *Esp. Ni. Pri. Cas.* 36.) appears to have holden, that if a ship be captured and recaptured, and afterwards arrive at her port of destination, and discharge her cargo, the mariner is entitled to his wages. And in the case of *Pratt* v. *Cuff*, (which is cited in *Thompson* v. *Rowcroft*, 4 *East's Rep.* 43.), the circumstances of which are little distinguishable from those of the case now before us, Lord *Kenyon* was strongly of opinion at Nisi Prius in favour of the plaintiff, who obtained a verdict for his wages during the space of seven months, for which period he was imprisoned by the *Dutch*, who afterwards released the vessel of which he was master, and thereby enabled him to complete his voyage: Lord C. J. *Eyre*, in *Curling* v. *Long*, (1 *Bos.* & *Pul.* 637.), and Sir *Wm. Scott*, in the case of the *Friends* (4 *Rob.* 144.), certainly held otherwise: but I am aware of no case which has yet decided, that where a ship has been seized originally, in the way of hostile reprisal,

1804.

BEALE *againſt* THOMPSON.

reprisal, or with a view to meaſures of retaliation, if it ſhould ultimately appear juſt and neceſſary to enforce ſuch meaſures, (and that ſeems to be the proper character and deſcription of the acts done in this caſe on the part of the *Ruſſian* Government); and where the ſhip has been afterw[illegible] reſtored, and the original right to ſeize not only re[illegible] from but renounced and abandoned, and reſtitution awarded on the part of thoſe who had ſeized; I ſay, I know of no caſe where property ſo dealt with has been conſidered as captured, or in which the conſequences of capture, as diſſolving a contract for freight or wages, have been conſidered as attaching. *Seizure*, even *hoſtile ſeizure*, is not neceſſarily *capture*, though ſuch is its uſual and probable reſult. The ultimate act or adjudication of the ſtate by which the ſeizure has been made aſſigns its proper and concluſive quality and denomination to its own original proceeding. If it condemn in ſuch caſe, it is a capture ab initio; if it award reſtitution as an act of juſtice, as the order of the 5th of *June* 1801 expreſsly does, it pronounces upon its own act as not being a valid act of capture, but as an act of temporary ſeizure and detention upon grounds not warranting the condemnation of the property, or the dealing with it as captured. It ſeems to make no material difference for this purpoſe, whether the reſtitution were awarded by the Government of the country as an act of ſtate, as in this caſe it was, or by any of the ordinary courts of civil judicature to which the adminiſtration of juſtice on theſe ſubjects is uſually delegated. Having ſtated that the acts in queſtion, although originally of an hoſtile tendency and aſpect, do not amount, according to the reſult of them, to a caſe of capture; they cannot, I conceive, of courſe have the effects of capture properly attributed to them; aſſuming

 that

1804.

BEALE *againſt* THOMPSON.

that one of ſuch effects would be to diſſolve contracts of affreightment and of wages. If the plaintiff's claim to wages be not defeated on the above ground, viz. of a diſſolution of contract ariſing from a ſuppoſed act of capture, it is next to be conſidered, Whether it be defeated in this caſe on any and what other ground? The right of the mariner to wages depends, firſt, upon the earning of freight by his owners in that voyage for which he was hired; and, ſecondly, upon the performance by the mariner of the ſervice he has agreed to perform in reſpect to ſuch owners during the voyage. And, firſt, Freight muſt be earned by the owners: which muſt be underſtood of freight for the ſpecific voyage for which the mariner was hired, and no other. In this caſe the full freight for the ſpecific voyage was earned and received. The ſhip went out in ballaſt to *Peterſburgh* to bring a cargo to *London*, and was to be paid freight for that cargo by the ton. It is found that the ſhip received the ſame freight as if ſhe had not been detained, and no more; in other words, ſhe earned and received all that ſhe could earn and receive under the actual contract of affreightment; and this without any new contract whatſoever being made. This freight was of courſe *freight for the voyage*, unleſs the contract under which it was to be earned was put an end to on the only ground ſuggeſted for that purpoſe, viz. capture, upon which we have pronounced already. Freight, therefore, *for the voyage* having been ſpecifically earned and received by the owners of the ſhip, the only remaining queſtion neceſſary to be decided, in order to perfect the plaintiff's claim to have his wages paid out of that fund, is, Has his ſervice as a mariner under his articles been duly performed by him? That ſervice appears by the articles ſtated in the ſpecial verdict to conſiſt in obeying the

lawful

lawful commands of his officers on board, "as a good 1804.
"and faithful ſeaman, and at all places where the ſhip
"ſhould put in or anchor at during the voyage, uſing his
"beſt endeavours for the preſervation of the ſhip and
"cargo, and not neglecting or refuſing to do his duty by
"day or night, nor going out of the ſhip on board any
"other veſſel, nor *being on ſhore* under any pretence what-
"ſoever till the voyage ſhould be ended and the ſhip diſ-
"charged of her cargo, without leave firſt obtained of the
"maſter, captain, or commanding officer on board, on
"pain of incurring the penalties of the ſtats. 2 *G.* 2.
"*c.* 36. and 37 *G.* 3. *c.* 73.; and that 24 hours without
"leave ſhould be deemed a total deſertion, ſo as to ſub-
"ject the mariner to thoſe penalties and forfeitures."
The articles then provide "that the mariner ſhould not
"demand or be entitled to his wages or any part of them
"until the ſhip's arrival at its port of diſcharge and the
"delivery of her cargo: and that if the mariner ſhould
"truly perform the above-mentioned voyage he ſhould be
"entitled to the wages or hire that ſhould become due to
"him purſuant to the ſaid articles." The queſtion then
is, Did the plaintiff perform the ſervice ſo ſtipulated?
The ſpecial verdict anſwers that queſtion as far as imme-
diately reſpects the voyage in the terms of the finding,
viz. "that he did his duty as a ſeaman during the voyage."
And no diſobedience of any command given or required
to be executed on board, no omiſſion of his beſt endea-
vours for the preſervation of the ſhip and cargo, no ne-
glect or refuſal to do his duty, is any where ſuggeſted on
the face of this ſpecial verdict. Nor is it ſuggeſted that
"he went out of the ſhip on board any other ſhip or veſ-
ſel," and which by the articles he is enjoined not to do.
The laſt and only remaining queſtion which can ariſe

BEALE *againſt* THOMPSON.

1804. BEALE against THOMPSON.

upon the particulars of his duty as specified in his articles, is, "Was he *on shore*" under any pretence *before the voyage was ended* and the ship discharged, without the leave of his commanding officer on board? And upon this head it is material to observe, that the "*being on shore*" here meant is, by reference made in the articles to the stats. 2 *G.* 2. *c.* 36. and the 37 *G.* 3. *c.* 73., and to the penalties imposed thereby, a *being on shore* analogous to that which is the object of penal restraint and correction under those statutes, viz. a departure and absence from the ship *by the unauthorised act of the party himself;* the words used in those statutes being "*desert, or refuse to proceed;*" "*desert or absent himself.*" "*absent himself without leave;*" "*leave such ship or vessel.*" all of which forms of expression import a departure from the ship by the party's own act; and by no means apply to the case of a seaman taken out of his ship in the manner stated in the special verdict, viz. "by a *Russian* guard, and marched into the interior of the country;" in which way, and by which means alone, it can be contended that he ever was *on shore* before the voyage was ended *without the leave* of his commanding officer. But if it were more questionable than it is whether he had incurred a breach of his articles in this particular, without any act, consent, or default, on his part, surely his being received on board again by the master, as soon as he, the master, was in a condition to receive and avail himself of, and the other, the mariner, in a condition to offer his service, if it do not amount to a virtual dispensation with his service in the interim, and a waver of any objection to his claim to be considered as a mariner still belonging to the ship under the original articles of service, it only does so, I apprehend, because it has not been expressly so found as a fact upon the face

of

1804.

BEALE *against* THOMPSON.

of the special verdict, as it most probably would have been if it had been expressly left to the jury for that purpose, a reasonable matter for them to have presumed under all the circumstances. But even as the fact stands on the special verdict, his "returning on board the ship, and afterwards proceeding on the voyage to *London*, as soon as the master and mariners had been respectively marched back to *Petersburgh*," and of course restored to a capacity of performing their relative duties towards the ship and each other, does, in the absence of any fresh contract on the subject, import, (if the case wanted it) a recognition on the part of the master that he and the sailors then stood in their original relative situation to each other under the articles by which that relation was constituted. This doctrine is familiar in those cases in which questions most frequently arise as to the continuance or discontinuance of a contract of service, viz in Sessions cases. In *The King* v. *Castle Church*, (1 *Burr.* S. C. 70.) Lord *Hardwicke* said, "Where a servant returns, and the master receives "him, it is always esteemed a dispensation of the master, "and helps the discontinuance, and works in the nature "of a remitter." So in *King* v. *Eaton*, in the same book, p. 48, the Court held "The absence of a servant for three "weeks was purged by the master's receiving him again, "which ought to be considered in that case as a dispensa-"tion; and, in strictness of law, he still continued in the "service of the master, notwithstanding such absence." And in the same way, in a case of forfeiture, a receipt of rent by a landlord conclusively imports in favour of the tenant that he was deemed by his landlord to be actually a tenant during the period for which the rent was received. Upon the whole, therefore, of this case, and without adverting to the probable convenience or incon-

1804.

Beale *against* Thompson.

venience which may result from our decision, it appears to us, in point of law, that the contract of service between the plaintiff and the defendant is to be considered as having continued and been in force from the time of executing the articles up to and at the period of the ship's arrival at her port of discharge and the final termination of her voyage there; and that the plaintiff is to be considered as entitled to his wages during the same time; and that the judgment which was given by the Common Pleas for the defendant must be reversed.

Judgment for the Plaintiff.

Johnson *against* Broderick.

Lord Ellenborough C J. afterwards gave judgment in this case, which, he said, was a writ of error from a judgment of *C. B.* upon a case similar in all respects to the foregoing one, except that here the plaintiff was a foreign seaman; which, his Lordship observed, made no difference whatever in the merits of the question. That in this case, therefore, as well as that of *Beale* v. *Thompson*, the judgment which was given in the Court of Common Pleas for the defendant must be reversed.

Judgment for the Plaintiff.

1804.

HALFORD *against* SMITH.

Wednesday, Feb. 8th.

In slander, tho' the defendant justify and it be found against him, yet if the damages be under 40*s* the plaintiff cannot recover more costs than damages.

TO an action on the case for slander there was a justification pleaded; and at the trial there was a verdict for 1*s.* damages; upon which the Master taxed the plaintiff his full costs. *Reader* obtained a rule for the Master to review his taxation, on the ground that by the stat. 21 *Jac.* 1. *c.* 16. if the damages in an action of slander be under 40*s.* the plaintiff shall have no more costs than damages.

Dayrell shewed cause, and said that the construction upon the auxiliary statute of the 22 & 23 *Car.* 2. *c.* 9, where the words were as strong as in the former, had always been that if the defendant justified, and his plea was found against him, he was entitled to costs in all personal actions, though the damages were under 40*s.* And he referred to *Redridge* v. *Palmer* (*a*), where that rule was recognised in *C. B.*

Lord ELLENBOROUGH C. J. That was an action of trespass. But in actions of slander the rule has always been otherwise in this Court (*b*). There is no statute which admits of it, and no case in support of it. And the Master is satisfied that full costs cannot be allowed.

Rule discharged.

(*a*) 2 *H. Bl.* 2. 3, 4.

(*b*) Vide *D*[illegible] v. *Robinson*, Qto. *Barnes*, 12[illegible], and *Bartlett* v. *Robbins*, per *Clive* J. 2 *W*[illegible]. 258.

1804.

Wednesday, Feb. 8th.

On the defendant's arrest his attorney procured his enlargement by undertaking to give a bail bond to the sheriff in due time; which he afterwards neglected to do, and the plaintiff recovered against the sheriff for the escape: held that such undertaking being contrary to the stat. 23 *H.* 6 c. 9. the Court would not proceed summarily against the attorney to make him pay the debt and costs for his breach of faith.

SEDGWORTH *against* SPICER.

THIS was a rule calling on the defendant's attorney to shew cause why he should not pay the sum of 41*l.*, the debt and costs, and also the costs of the application. The rule was obtained on the part of the sheriff's officer, to whom the defendant's attorney had undertaken that if the officer who arrested the defendant would let him go at large he would give a bail-bond to the sheriff in due time. This undertaking not having been fulfilled, the plaintiff in the action sued the sheriff for an escape, and recovered against him.

Lawes shewed cause against the rule, on the ground that the undertaking of the defendant's attorney was in itself illegal and void, as contrary to the duty imposed on sheriffs by the statute 23 *Hen.* 6. *c.* 9. to take bail-bonds only for the appearance of defendants; and to the express adjudication of this Court in *Rogers* v. *Reeves* (*a*), and *Fuller* v. *Prest* (*b*). And said, that this was an attempt indirectly to recover the money paid by the sheriff back from the defendant's attorney, when, according to *Eyles* v. *Faikney* (*c*), it could not be recovered from the defendant himself the original debtor.

Reader, in support of the rule, endeavoured to distinguish this from the former cases; on the ground that this was an application against an officer of the court, the attorney, over whom the Court had a summary jurisdiction,

(*a*) 1 *Term Rep.* 418. (*b*) 7 *Term Rep.* 109.
(*c*) *B. R. E.* 32 *G.* 3. cited in *Peake's Ni. Pri. Cas.* 144 *n.*

for

1804.

SEDGWORTH *against* SPICER

for mala fides in the exercise of his profession, in prevailing on the sheriff's officer to discharge the defendant upon the faith of a lawful undertaking, which he had failed to fulfil. That here the undertaking was to do that which the law required, namely *to give a bail bond to the sheriff*, and not as in the former cases to substitute something else in lieu of the bail-bond; and if the attorney had performed his engagement, there would have been no breach of the law; though the sheriff would, in the mean time, have taken upon himself the risk of letting the defendant go at large, a risk which was not illegal in itself, nor meant to be restrained by the statute. And in *Rogers* v. *Reeves* (*a*) it was said by Mr. Justice *Buller* that the statute did not extend to undertakings by attornies to the parties.

Lord ELLENBOROUGH C. J. The case of undertakings by the defendant's attorney to the plaintiff in the cause have been sustained; but to sustain an undertaking of this sort by the attorney to the sheriff's officer would be to engage the latter to do an act which is directly contrary to his duty under the stat. 23 *H.* 6., which provides "that no sheriff, &c. shall take or cause to be taken or "make any obligation for any cause aforesaid, or by co- "lour of their office, but only to themselves, of any per- "son, nor by any person which shall be in their ward by "the course of the law, *but by the name of their office*, and "*upon condition written*, that the said prisoners shall ap- "pear at the day contained in the said writ," &c. The act then having proscribed any security to be taken by sheriffs and their officers except in writing and in a prescribed form, and the undertaking in question not being

(*a*) 1 *Term Rep* 422.

in

1804.

Sedgworth *against* Spicer.

in fuch written form, it is abfolutely void. An inconvenience may refult from this in particular inftances, and the conduct of the defendant's attorney in this cafe feems to have been very reprehenfible; but the letter of the law is peremptory, and we can look to nothing elfe. I truft, however, we fhall hear of no more fuch experiments from the fame quarter.

Grose J. Both parties are much to blame, and therefore it is not for us to extend relief to either. I know that any departure from the directions of the ftatute is attended with great mifchief: it gives a handle for extortion: and every attempt of the fort ought to be repreffed and punifhed.

Lawrence J. This is a conteft between difhonefty and breach of duty. The defendant's attorney has behaved very difhoneftly, and the fheriff's officer has been guilty of a breach of his duty as prefcribed to him by the ftat. of *H.* 6. It is difficult to fay which of the two is moft to blame. But it is fit that the defendant's attorney fhould underftand that it is only for the fake of the public, and to prevent a practice which leads to extortion, that we refufe to liften to an application againft one who has acted fo difhoneft a part and fhewn himfelf fo little truftworthy.

Le Blanc J. declared himfelf of the fame opinion.

Rule difcharged.

1804.

PEARSON *againſt* REYNOLDS.

Thurſday, Feb. 9th.

After a Judge's order obtained by the defendant for time to plead, and no plea within the time, the plaintiff may ſign judgment as for want of a plea without a demand of it.

UPON a motion to ſet aſide proceedings for irregularity, the only queſtion was, Whether the defendant, having obtained a Judge's order for time to plead, and not having pleaded within the time given, the plaintiff was entitled to ſign judgment as for want of a plea, without a demand of a plea?

Eſpinaſſe, who ſhewed cauſe, contended that it was not neceſſary to demand a plea in this caſe; and cited *Starkie* v. *Wilkes*, *M.* 7 *G.* 2. in *B. R.* 1 *Crompt. Prac.* 162. 1 *Tidd's Prac.* 396. and *Towers* v. *Powell*, 1 *H. Blac.* 87.

Barrow, contrà, maintained that the obtaining a Judge's order for time to plead did not, according to the modern practice, diſpenſe with the neceſſity of either the demand of a plea or a rule to plead; though the practice in *C. B.* might be different.

Lord ELLENBOROUGH C. J. ſaid that the only queſtion now was, Whether a demand of a plea were neceſſary after a Judge's order for time to plead? for it was not ſworn that there was no rule to plead. And that it ſeemed reaſonable to diſpenſe with the demand of a plea, where the party had the additional time given him which he aſked for, and within which he was bound to plead. And that the Maſter had furniſhed him with the following caſe in point.

"The defendant obtained an order for time to plead; and after the time expired the plaintiff ſigned judgment without calling for a plea. And the Court held it regular, and refuſed to ſet it aſide. *Burkett* v. *Latham*, *Mich.* 9 *Geo.* 2."

Per Curiam, Rule diſcharged.

1804.

Friday, Feb. 10th.

A. having brought an action againſt *B*, the latter filed a bill in equity againſt him for a diſcovery and injunction and for an account, to which *A* having put in his anſwer, denying the allegations of *B*. which involved the merits of the ſuit at law, the injunction was diſſolved: on which anſwer *B* indicted *A* for perjury, and the indictment and action coming on to be tried at the ſame aſſizes, the indictment ſtanding firſt held that *B* was a competent witneſs to prove the perjury, as he could not avail himſelf of the conviction of *A*. in any civil proceeding between them either in law or equity.

The KING *againſt* BOSTON.

THE defendant was indicted for perjury, committed in two anſwers ſworn to by him in a ſuit in the Court of Exchequer, wherein he was defendant, and one *John Briggs* was complainant. Previous to that ſuit, *Boſton* and *Briggs* had had dealings together in cattle, the one being a grazier, the other a butcher; and in 1800 *Boſton* brought an action at law againſt *Briggs* to recover a balance of 80 guineas upon the ſale of cattle three or four years before. Whereupon *Briggs*, alleging payment, filed the bill in the Court of Exchequer *for a diſcovery*, and alſo *for an account*, upon which an injunction went of courſe; and the defendant *Boſton*, in his firſt anſwer, poſitively *denied that he ever did receive of the ſaid* John Briggs *the ſum of* 80 *guineas, as ſtated in the ſaid bill of the ſaid* J. Briggs *to have been paid to the ſaid* J. Boſton *in part of the ſaid account*, or in reduction of his, *Boſton*'s, demand on *Briggs*, and that he, *Boſton*, therefore *denied that the wife of* Briggs *was or could be preſent at any time when* Briggs *paid* Boſton *the ſaid ſum of* 80 *guineas*. *Boſton* alſo *denied having ever received from* Briggs *any money whatever in part of the account mentioned in the bill*. The firſt aſſignment of perjury was made upon the facts ſworn to by *Boſton* in that anſwer. The ſecond aſſignment of perjury aroſe on the defendant's further anſwer put in, (after exceptions taken and allowed to the firſt,) wherein he *denied that* Briggs *did other than and except as in* Boſton's *former anſwer, ſtated in the preſence of* Briggs' *wife, count out and pay or deliver to him*, Boſton, 80 *guineas, or caſh to the amount of* 84*l*., *or that he*, Boſton, *did receive or take away with him any ſuch ſum*

sum of money, &c. on account of the said dealing, &c. between him and Briggs. No exception being taken to this second answer the injunction was of course dissolved, and the plaintiff in the action was at liberty to proceed. That action and this indictment came on to be tried at the last assizes for the county of *Cambridge*, and the indictment was entered for trial next before the action. In support of the allegation of perjury *Briggs* the prosecutor and the defendant in the action was called as a witness, against whose competency, an objection was taken on the part of *Boston*, on the ground that *Briggs* was interested to procure a conviction, which might be made use of by him to influence the event of the suit in equity, and to obtain a perpetual injunction; as that Court, it was alleged, would never suffer the plaintiff to avail himself of a recovery at law after he had been convicted of perjury upon an answer affecting the merits of the verdict at law. The Lord Chief Baron, before whom the cause was tried, over-ruled the objection to the *competency* of the witness; and on his testimony, corroborated by that of others, the jury found the defendant guilty. In *Michaelmas* term last a rule nisi was obtained for setting aside the verdict and granting a new trial, on the grounds that *Briggs* was an incompetent witness, and also that the verdict was against the weight of evidence.

Wilson (and *Best* was to have argued on the same side) now shewed cause, and contended that *Briggs* was a competent witness. In the early cases a great contrariety of opinion is to be found as to what should be deemed objections to the *competency* or only to the *credit* of a witness. Most of those, which have gone to establish the incompetency of the witness on the ground of an interest in

1804.

The KING *against* BOSTON.

ſome other collateral proceeding, have gone upon the authority of *Rex* v. *Whiting* (*a*), where one who had been induced by the fraud of the defendant to ſign a note of hand was not allowed to be a witneſs on an indictment againſt him for ſuch fraud; becauſe, as it was ſaid, his conviction would *influence* the jury in an action on the note. This governed the deciſion in *Rex* v. *Ellis* (*b*), where one againſt whom a recovery was had in ejectment upon the teſtimony of a witneſs was holden not to be competent to prove the falſehood of ſuch teſtimony upon an indictment againſt the witneſs for perjury: and alſo the deciſion in *Rex* v. *Nuney* (*c*), where one who had filed a bill of injunction to ſtay proceedings in an action brought againſt him on a promiſory note was not ſuffered to prove perjury in the defendant's anſwer to ſuch bill. It is not however obvious how the convictions in thoſe caſes could have availed the parties procuring them. And the ſoundneſs of the rule in *R.* v. *Whiting* ſeems firſt to have been queſtioned by Lord *Hardwicke* in *Rex* v. *Bray* (*d*), and was directly denied to be law by Lord C. J. *Lee*, in *Rex* v. *Broughton* (*e*); and there it was eſtabliſhed that the objection to a witneſs in a criminal proſecution, on the ground that he is intereſted in the deciſion of a ſimilar queſtion in a civil action, goes only to his credit, and not to his competency, unleſs the conviction in the proſecution where he is a witneſs can be given in evidence in the cauſe where he is intereſted as a party. The ſame doctrine was confirmed by Lord *Mansfield* in *Abrahams* v. *Bunn* (*f*), and fully eſtabliſhed, after much conſideration of all the caſes, in *Bent* v. *Baker* (*g*), and in *Smith* v.

(*a*) 1 *Salk.* 283. (*b*) 2 *Stra.* 1104. (*c*) 2 *Stra.* 1043.
(*d*) *Rep. temp. Hardw.* 358. (*e*) 2 *Stra.* 1229. and vide 4 *Burr* 2255.
(*f*) 4 *Burr.* 2251. (*g*) 3 *Term Rep.* 27.

Prager.

Prager (*a*). Now here, *Briggs*, by convicting *Boston* of perjury, could obtain no advantage in the trial at law wherein *Briggs* was defendant; for such conviction could be no evidence in the action which was next to be tried. But it will be argued that *Briggs* could avail himself of it to obtain relief in equity in case there was a verdict against him at law; and this, upon the authority of some Nisi Prius cases. But most of these were before *Bent* v. *Baker*, and all before *Smith* v. *Prager*. Neither can the principle of those decisions be supported. The objection to the witness supposes that the Judges at Nisi Prius must know in what cases a court of equity would relieve against a verdict at law, of which they are not supposed to be competent judges; and it would not be convenient thus to blend the two jurisdictions, which have always been kept apart. Truth might thus be unadvisedly shut out in a case where a court of equity would not have interfered. It is a safer and more certain rule, that where a witness has no *legal* interest, but some possible equitable interest, he should be heard at law; and if a conviction follow upon his evidence a court of equity will have to consider afterwards what weight ought to be given to a verdict so obtained. A distinction, however, runs through all the Nisi Prius cases, where the indictment is against the *party* to the cause, or only against a *witness*. Where a third person, a witness, is indicted for perjury, equity might, after a conviction, give relief to the party injured, because he would be too late to obtain it at law, and that may be a reason for rejecting the evidence of the party on the trial of such indictment; but the same reason does not hold where the indictment is against a party; for he never could have been a witness in his own cause, and therefore

1804.

The KING *against* BOSTON.

(*a*) 7 *Term Rep* 60.

1804.

The KING *against* BOLTON.

equity would give no relief on his conviction, as the merits of the cause must be substantiated by the testimony of others. The conviction in that case is collateral to the civil suit. On this distinction the case of *Rex* v. *Dalby*(a) turned; where one, who had been charged in an action with a sum of money by the testimony of the only witness examined, was ruled by Lord *Kenyon* not to be a competent witness against him on an indictment for perjury in giving such testimony, though the prosecutor had paid the money recovered; because, as Lord *Kenyon* said, upon a conviction of the only witness to support the former verdict the Court of Chancery would, upon the matter disclosed in a new or supplemental bill, order the money to be refunded. There, indeed, another case was cited, of *Rex* v. *Menetonè* (b), more like the present, being an indictment against the *party* for perjury in an answer in Chancery, where the other party, who had filed a bill against him for an injunction, which was still depending, was rejected by *Buller* J. as an incompetent witness to prove the perjury, on the ground that, by convicting the defendant, the plaintiff in the suit in equity would obtain a perpetual injunction. That opinion, however, does not accord with the decision of Lord Keeper *Henley* in *Bart*-

(a) Sittings at *Westminster* after *Tr.* 30 *G.* 3. *Peake's Ni. Pri. Cas.* 12.

(b) The following was the note read to Lord *Kenyon* in *R.* v. *Dalby*.— *Rex* v. *Menetone*, *Westminster* Sittings after *Trin.* 26 *G.* 3.—This was an indictment for perjury, assigned on an answer in Chancery put in by the defendant in answer to a bill of injunction filed by the prosecutor to stay his proceedings in an action at law brought by the defendant, the plaintiff in that suit. *The injunction had not been moved to be dissolved.* It was objected to the admissibility of the prosecutor as a witness, that upon the conviction of the defendant for perjury the injunction would not be dissolved, but would continue perpetual. And *Buller* J. allowed the objection, and rejected the prosecutor as a witness.

lett

1804.

The King *against* Boston.

lett v. *Pickersgill* (a), who dismissed a supplemental bill filed under the same circumstances for a conveyance, after a conviction of the defendant for perjury in his answer to a former bill filed for the same purpose; which conviction it appears was obtained on the plaintiff's evidence (b).

(a) Cited in *Abrahams* v. *Bunn*, 4 *Burr* 2255.

(b) Lord *Ellenborough* C. J. observed that there was other evidence given in that case besides that of the plaintiff. and he read the following note of *Bartlett* v. *Pickersgill*, which was taken by Mr Justice *Aston*.

Bartlett v. *Pickersgill*, *Tr.* 32 & 33 *Geo* 2 in Chancery.—The defendant bought an estate for the plaintiff, but there was no written agreement between them, nor was any part of the purchase money paid by the plaintiff. The defendant articled for the estate in his own name, and refused to convey to the plaintiff: so this bill was brought to compel a conveyance. There being no written evidence that the estate was purchased for the plaintiff, the question was, Whether the plaintiff might give parol evidence thereof?

Lord Keeper *Henley* (without hearing the defendant's counsel) The question is, Whether this evidence be competent or not? This will depend on the statute of frauds. To allow it in this case would be to overturn the statute. The reason for making the statute was the confusion of property, owing to perjury, either for money or affection. The statute says, no trust shall be of land, unless there be a memorandum in writing, except such trusts as arise by operation of law. It is not like the case of money paid by one man, and a conveyance taken in the name of another. There the bill charges that the estate was bought with the plaintiff's money. If the defendant say he borrowed it of the plaintiff, then the proof will be, Whether the money were lent or not? If it were not lent, the plaintiff bought the land. If I were to allow the evidence in the present case, I do not know a case where the statute would take place. The Judges have taken several cases out of the statute, as agreements in part executed If *Bartlett* had paid any money, it would have been a reason with me to admit the evidence; or if there had been any fraud used by the defendant to prevent an execution of the agreement, but as there is none, the bill must be dismissed with costs.

N. B The defendant, having by his answer denied the trust, was indicted for perjury in that particular, and convicted on the evidence of the plaintiff; circumstances confirming that testimony, and proof, by other witnesses, of declarations by the defendant. Afterwards the plaintiff petitioned for leave to file a supplemental bill in nature of a bill of review, stating this conviction. But Lord Keeper *Henley* dismissed the petition the 22d of *November* 1760

1804.

The King *against* Boston.

In *Rex* v. *Eden* (a), the indictment for perjury was against the only *witness* in a prior cause of *Earle* v. *Brett*, on whose testimony a verdict passed for *Earle*; and therefore *Brett*, who had not paid the debt and costs recovered in that action, though his bail were fixed, was rejected by Lord *Kenyon* as an incompetent witness to prove the perjury; because the conviction of *Eden* might be the means of obtaining relief in equity against the judgment in the action. But in *Rex* v. *De Faria* (b), where the indictment was against a *party* who claimed in the ecclesiastical court under a prior will which was there set aside, Lord *Kenyon* permitted the executrix under a subsequent will which was established to prove the perjury of the defendant in the ecclesiastical suit; because, as he said, though the Crown might grant a commission of review in case the defendant was acquitted on the merits, yet no objection could be made to her testimony on that account, as she could not be examined on that review. So in *Rex* v. *Pepys* (c), where cross bills had been filed in Chancery for redeeming and foreclosing mortgaged premises; wherein it became a material question, Whether the defendant, (the plaintiff in the bill of foreclosure) had notice of the assignment of the equity of redemption to the late husband of *Elizabeth Knight*, (the plaintiff in the bill for redemption) which she had sworn in the affirmative in her answer, as the defendant had sworn in the negative in his? she was admitted by Lord *Kenyon* as a witness in the indictment for perjury against *Pepys* for such denial of no-

(a) Sittings after *Hil.* Term, 34 *Geo.* 3. cor. Lord *Kenyon* C. J. 1 *Espin. N. P Cas.* 97.

(b) Sittings at *Guildhall* after *Mich.* Term, 32 *Geo.* 3. cor. Lord *Kenyon* C. J. *Peake's N. P. Cas.* 104.

(c) *Ib.* 138. sittings after *Trin.* Term, 32 *Geo.* 3. cor. Lord *Kenyon* C. J.

tice,

tice, on the ground that ſhe muſt adduce other evidence than her own to prove her caſe in Chancery. It is plain, therefore, that Lord *Kenyon* did not conceive that the conviction of the defendant in that indictment could have been the ground of relief in equity. And it would be inconſiſtent to ſuppoſe that it could; for then a plaintiff in equity, by convicting the defendant of perjury upon his anſwer, might, by means of his own evidence upon ſuch indictment, entitle himſelf to relief in equity. Beſides, the only relief which *Briggs* could obtain in the ſuit in the Exchequer was a perpetual injunction to reſtrain *Boſton* from ſuing at law: but it is not the courſe in equity to grant ſuch an injunction on an anſwer coming in, unleſs upon admiſſions in ſuch anſwer. The opinion, therefore, of Mr. Juſtice *Buller*, in *Rex* v. *Menetonè*, was founded on a miſtake in that reſpect. And even in the caſe of a conviction of a witneſs for perjury, which Lord *Kenyon* appears to have conſidered as available to the party procuring the conviction, no inſtance has been ſhewn of a court of equity proceeding upon ſuch a conviction as a ground for a perpetual injunction. He alſo argued that the weight of evidence was with the verdict.

1804.

The KING *againſt* BOSTON.

Sellon Serjt., in ſupport of the rule. The diſtinction ſaid to run through the caſes is admitted not to be without exceptions, and having never been judicially recogniſed, the Court will not decide upon ſo uncertain a ground. But in *Watt*'s caſe (*a*) it was expreſsly decided that the party injured by the perjury ſhall not be admitted as a witneſs in an indictment againſt the party perjured, becauſe he may receive a conſequential advantage from the verdict. And in all the ſubſequent caſes wherein the

(*a*) *Hardr.* 331.

1804.

The King *against* Boston.

rule has been enlarged to let in the testimony of witnesses, who could not avail themselves in any other proceeding of the verdict in the suit pending, the cases of perjury and forgery have always been admitted to be exceptions. But supposing it were necessary to shew a direct interest in the witness, such an interest exists here; for the perjury assigned in this case involves the whole merits of the defendant's claim in the action at law; and if the conviction stand a court of equity would not suffer a plaintiff under such circumstances to avail himself of a verdict at law, which, if his conviction were just, could not conscientiously be obtained. And here the bill in the Exchequer, which was filed by *Briggs* for *an account* as well as for *a discovery*, is *still pending*, though the injunction against *Boston*'s proceeding in his action at law was dissolved; which materially distinguishes this case from most of the others where the interested party's testimony was received. In *Rex* v. *Nuney* (*a*), the bill in the Exchequer for staying proceedings in an action at law being then pending, the plaintiff in that bill was rejected as a witness to prove perjury in the defendant's answer to it. That is an authority in point; which, being in the excepted case of perjury, has never been shaken. For though Lord *Mansfield*, in *Abrahams* v. *Bunn* (*b*), supposed it to have been over-ruled in *Rex* v. *Broughton* (*c*), yet that was a mistake; for there the suit in Chancery was ended, the bill had been dismissed, and the Court, in giving judgment, distinguished it from *Rex* v. *Nuney*, where the bill was still *pending*. And so it was in *Rex* v. *Menctonè* (*d*), where the witness was rejected by Mr. Justice *Buller*. In *Rex* v. *Dalby* (*e*), where the bill

(*a*) 2 *Stra* 1043. (*b*) 4 *Burr.* 2255. (*c*) 2 *Stra.* 1229.
(*d*) *Ante*, p. 576 n. (*e*) *Peake's N. P. Cas* 12.

had

1804.

The KING *against* BOSTON.

had been dismissed, yet Lord *Kenyon* rejected the party injured by the perjury committed in the answer; because the Court, in case of a conviction, would, on the new matter stated in a new or supplemental bill, give relief. As in *Needham* v. *Smith* (*a*), where it is said that the party was entitled to a rehearing after the conviction of a witness against him for perjury. And in *Rex* v. *de Faria* (*b*), where the witness was admitted, all proceedings in equity were necessarily at an end, as he had succeeded there. And so in *Rex* v. *Pepys* (*c*), the bill of the witness examined had been dismissed. And upon the same principle his Lordship, in *Rex* v. *Eden* (*d*), the last of the cases decided by him, rejected the witness; because he, not having paid the debt and costs in the suit in which the perjury was committed against him, would be entitled to relief in equity if the conviction took place. He also referred to *Fanshaw*'s case (*e*), and to *Co. Lit.* 6. *b.* notes. And then he was heard on the second ground of objection, that this was a verdict against the weight of evidence.

Lord ELLENBOROUGH C. J. The verdict is impeached on two grounds; 1st, on the incompetency of *Briggs* the prosecutor, as a witness, who it is said was interested in procuring the conviction, which will be available to him in some manner or other for obtaining relief in equity against the defendant's action at law. But no instance has been mentioned to shew that a court of equity would look at a conviction for perjury procured on the testimony of a party in order to sustain that party's interest. And the case of *Bartlett* v. *Pickersgill* is an authority the other way: where, after a conviction for perjury obtained upon

(*a*) 2 *Vern.* 464. (*b*) *Peake's N. P. Cas.* 104. (*c*) *Ib.* 138.
(*d*) 1 *Espin. N. P. Cas.* 97. (*e*) *Skin.* 327.

1804.

The King *against* Boston.

the evidence of the party injured and others, and a petition thereon for leave to file a supplemental bill, Lord Keeper *Henley* would not allow such petition, not thinking himself at liberty to advert to a conviction so obtained. For it would, in effect, be making the testimony of the party himself evidence in support of his own bill. We cannot, then, admit of the objection to the witness's competency without breaking in upon two most material cases, *Bent* v. *Baker*, and *Smith* v. *Prager*, in which the rule was well laid down and established; that where a party is not immediately interested in the cause, nor has any interest in the event, in support of which the verdict in that cause may be given in evidence by him in any other proceeding instituted by or against him, he is a competent witness. The only anomaly that I know in the law, which may be regarded as an exception to this rule is in the case of forgery; where a prosecutor shall not be permitted to say that the bond purporting to have been made by him was forged. I put this only as an instance. Upon what principle that anomalous case was so settled I cannot pretend to say; but having been so settled, it may be too much for judges sitting on trials to break in upon it. The anomaly can only be remedied now by the legislature. This verdict, then, not being evidence for or available in favour of the prosecutor in any case, I must consider him as a competent witness to support the charge. His Lordship then spoke to the other objection upon the merits, on which he did not see sufficient ground for impeaching the verdict.

Grose J. As to the objection in point of law, upon the incompetency of the witness, I should be sorry to have the rule disturbed which I have always understood to be

law ſince the caſe of *Bent* v. *Baker*, that unleſs a perſon be intereſted in the event of the cauſe he is a competent witneſs. The queſtion then is, Whether *Briggs* the proſecutor were intereſted in the event of the cauſe? It has been contended that he was, becauſe it is ſaid that his procuring the conviction will be the means of affording him relief in equity. But that is anſwered by the caſe of *Bartlett* v. *Pickerſgill*, againſt which no authority has been ſhewn. It is enough then to ſay that the witneſs was not intereſted in the event of the proſecution, and therefore, according to *Bent* v. *Baker*, the law of which I ſhould have been ſorry to have heard doubted, he was a competent witneſs. The learned Judge alſo agreed to ſuſtain the verdict on the weight of evidence.

LAWRENCE J. After the two points have been ſo fully diſcuſſed, it is only neceſſary for me to ſay, that on the point of law I fully agree with my Lord and my Brother *Groſe*.

LE BLANC J. I am of the ſame opinion. The objection in point of law muſt depend upon the witneſs having ſome intereſt in procuring the conviction. But after all the inquiry which has been made, it does not appear that any uſe can be made of this conviction in a court of equity for any purpoſe of the proſecutor.

Rule diſcharged.

1804.

Saturday, Feb. 11th.

BROWN *against* VAWSER.

An award in writing and under seal need not have a deed stamp, unless delivered as *a deed*; but being only delivered as an *award* it is sufficient if it have the award stamp of 10*s.* An award which is required to be made in writing, &c. and *ready to be delivered* at such a time is complete if made in writing and *ready to be delivered* by the arbitrator within the time, though not actually delivered.

ERSKINE shewed cause against an attachment for non-performance of an award; and objected to the award itself as being on an award stamp of 10*s.*; whereas being under seal it ought to have been upon a further deed stamp of 25*s.*

Best, contrà, said that the award, though under seal, was not a deed, unless *delivered as a deed*; and cited *Shep. Touch.* 55—8., and *Styles*, 459. *Dodd* v. *Herbert*; which agreed with the last decision upon this subject, namely, *Wilson* v. *Smee*, *Hil.* 1798, in the addendum to the last edition of *Kyd* on Awards. And he read the terms of the submission in this case, which were to abide the award of the arbitrator, "so as the award of the said arbitrator be made "and set down in writing under his hand *and seal*, and "*ready to be delivered* to the said parties on or before the "1st of *May* 42 *Geo.* 3." But it did not say that it was to be by deed; neither was it delivered as *a deed* but as his *award*.

Lord ELLENBOROUGH C. J. This not being delivered as a deed, there could be no occasion for a deed stamp. The award was complete when it was *ready to be delivered* within the time appointed, and prior to the actual delivery; the arbitrator was then functus officio: and if any accident had happened afterwards to prevent his making a delivery, it would still have been an award.

LAWRENCE

1804.

BROWN *against* VAWSER.

LAWRENCE J. The fame queftion has been feveral times agitated in court: and I think our final determination was that if the arbitrator delivered an award under feal as a *deed*, it muft then have a deed ftamp; but that though it were to be by a writing under feal, yet if it were not delivered as a deed, it was fufficient if it had the common award ftamp.

Per Curiam, Rule abfolute.

DOE, on the Demife of PINCHARD, *againft* ROE.

Saturday, Feb. 11th.

Proceedings in ejectment ftayed until the cofts of a former ejectment, and alfo of an action for mefne profits, were paid.

A Rule was obtained to ftay proceedings in this ejectment, as to one *Wm. Fells*, the perfon in poffeffion, until the cofts of a former ejectment, brought by *Fells* againft *Pinchard* for the fame premifes, of which *Pinchard* was then tenant in poffeffion, and in which ejectment there was judgment by default; and alfo until the cofts of an action for mefne profits, brought by *Fell* againft *Pinchard*, wherein *Fell* recovered, and upon which *Pinchard* has brought a writ of error, were paid.

And the *Court*, after hearing *Beft* againft the rule, and *Gafelee* in fupport of it, made the

Rule abfolute.

SMITH and Others *againft* WOODWARD.

Saturday, Feb. 11th.

Where plaintiff declared on bond *with a profert*, on non eft factum pleaded, fecondary evidence of the bond, by means of a copy, and fhewing that the defendant had taken away the original, and before action brought faid he had burnt it, is not fufficient to fuftain the declaration.

THE plaintiffs declared in debt on bond, *with a profert in Curiam*; to which non eft factum was pleaded. The plaintiffs were parifh officers, and the bond was in

fact

1804.

SMITH and Others *against* WOODWARD.

fact given by the defendant to indemnify the parish against the expence of a bastard child of which the defendant's son was the putative father. At the trial, the plaintiffs could not produce the bond itself, but they produced the draft from whence it was fairly copied by the solicitor, and who afterwards proved the bond to have been properly executed and attested: and they accounted for the non-production of the original by proving that when the parties were before the magistrates, after the execution of the bond, the defendant got possession of it and went off; and upon being applied to for it, *before the action was brought*, he said that he had *burnt* it. They also proved notice to the defendant to produce it; and shewed that the parish had been damnified to the amount of 3*l.* 12*s.* 6*d.* And the verdict was taken for that sum; after an objection made and over-ruled at the trial before the Lord Chief Baron at *Cambridge*, that the bond having been pleaded with a *profert*, no secondary evidence could be admitted, as the instrument itself was presumed to be in court. A rule nisi was obtained in *Michaelmas* term last for setting aside the verdict; against which

Hart (with *Wilson*) now shewed cause, and contended shortly, that the bond having been traced into the defendant's own hands, and notice given to him to produce it, his refusal let in the secondary evidence of necessity: and it was not to be taken upon his bare assertion that the bond was destroyed; but every presumption was to be made against him.

Sellon Serjt. and *Best*, in support of the rule, were stopped by the Court.

Lord

1804.

SMITH and Others *against* WOODWARD.

Lord ELLENBOROUGH C. J. There is no case, where the issue being whether such a deed, profered by the plaintiff to the view of the Court, and supposed to be in court at the time (*a*), be or be not the deed of the defendant, in which it has ever been decided that any thing can dispense with the production of the deed itself. If a deed be lost or destroyed, (and here there was evidence that the plaintiff was informed that it was so before any action brought,) the plaintiff may declare upon it as lost or destroyed: but here he has precluded himself by his mode of declaring, in which he takes upon him to aver the existence of the instrument, and offers it in court. So if it were lost or destroyed, after having declared upon it, the plaintiff might have moved to put off the trial, and amend. But here he has persevered in his original error, notwithstanding the information given him.

Per Curiam, Rule absolute (*b*).

(*a*) Vide *Sheph. Touch.* 70, 71. If the deed be denied, it is to be kept in court till it be determined.

(*b*) Vide *Read* v. *Brookman,* 3 *Term Rep.* 151. and the cases there cited, particularly *Totty* v *Nesbitt, T.* 24 *Geo.* 3. *B. R.*, and *Mattison* v *Atkinson, T.* 27 *Geo.* 3. *B. R*

In the Matter of Sir EDWARD PRICE, a Prisoner.

Monday, Feb. 13th.

A habeas corpus ad testificandum issued to bring up a prisoner to give evidence before an election committee of the House of Commons, on affidavit of service of a rule to shew cause on the different persons concerned, and no cause shewn.

THIS prisoner was confined in *Ilchester* gaol by virtue of a commitment by this Court for non-payment of a fine imposed on him as part of the judgment of the Court upon an indictment for an assault. And a petition having been presented to the House of Commons from

Mr.

1804.

In the Matter of Sir Ed. Price, a Prisoner.

Mr. *Webb*, complaining of an undue election and return for the borough of *Ilchester* in the county of *Somerset*, against the sitting member Sir *Wm. Manners*, for the trial of which a committee of the House was to be balloted for on the 14th of this month, in support of which petition the prisoner was stated to be a material witness; the Speaker, upon application, had issued his warrant to bring up the witness by the day appointed; but, to obviate any difficulty which the gaoler might make to suffer the prisoner to go out of confinement without the authority of this Court,

Wetherell, on a former day, applied for a habeas corpus ad testificandum to issue to the gaoler of *Ilchester* gaol to bring up the witness before the committee; and said that he had been informed of such an application having been before granted by the Court to bring up a prisoner to be examined in some matter before the House of Lords, upon the refusal of the gaoler to let his prisoner go without such authority. And this motion was made upon an affidavit of the circumstance abovementioned and of the materiality of the witness.

The Court at first entertained doubts of the propriety of such an application, of which they did not recollect any precedent. But after some hesitation they gave a rule to shew cause; and desired that it might be served on the Attorney-General, and the gaoler, and also on all persons at whose suit the witness might be detained in custody on civil process at the time. And now

Nolan moved to make the rule absolute, no cause being shewn, on an affidavit of the service of it on the under-

sheriff,

ſheriff, the Solicitor of the Treaſury, the priſoner himſelf, and one *Thomas King*, the only perſon at whoſe ſuit the priſoner was then in execution; he being ſuperſedeable in other cauſes in which he had been detained at the ſuit of other creditors on meſne proceſs.

1804.

In the Matter of Sir ED. PRICE, a Priſoner.

And *The Court*, upon the applicant's undertaking to be at the expence of bringing the witneſs up and returning him to cuſtody, made the

Rule abſolute.

LEWIN, Executor, &c. *againſt* SMITH the Younger.

Monday, Feb. 13th.

In bailable proceſs the plaintiff cannot declare againſt one defendant ſeparately upon joint proceſs and affidavit to hold to bail againſt two; though they were ſued upon a joint and ſeparate promiſſory note.

THE plaintiff having ſued out one latitat againſt *Smith* the elder and *Smith* the younger, on their joint and ſeparate promiſſory note, upon one affidavit of debt, ſtating them to be jointly and ſeparately indebted to him; on which the defendant alone was arreſted and holden to bail; afterwards declared againſt the defendant ſeparately. Whereupon a rule was obtained calling on the plaintiff to ſhew cauſe why all the proceedings ſhould not be ſet aſide for irregularity; which was afterwards ſupported by

Beſt, upon the ground that both the defendants being joined in one ac etiam, and included in one affidavit of debt, as upon a joint cauſe of action, if the plaintiff could afterwards declare ſeparately againſt one he might declare ſeparately againſt both as for diſtinct cauſes of action, and thereby the revenue be defrauded of one ſet of ſtamps, and one part of the proceſs made incongruous with another:

1804.

LEWIN *against* SMITH.

ther: and he referred to *Holland* v. *Johnson* (*a*), and the cases there cited as settling the practice.

Gaselee shewed cause, and attempted to distinguish this from all the former cases; for there the rule laid down was, that several defendants could not be joined either in one writ or one affidavit to hold to bail, for *distinct causes of action*: but this appeared to be for the *same* cause of action, in which case there was no reason why the plaintiff might not afterwards drop proceedings against one of the defendants.

The Court, however, were clear that the declaration should be set aside for irregularity, not having followed the writ and affidavit to hold to bail; it not being competent to declare separately against one of two defendants upon joint process and affidavit against both. And to that extent they made the

Rule absolute (*b*).

(*a*) 4 *Term Rep.* 635.

(*b*) Vide *Stables* v. *Ashley and Others*, 1 *B. & Pull.* 49. S. P. in *C. B.*

Monday, Feb. 13th.

HAYWOOD and Another *against* RODGERS.

As an assured impliedly warrants the ship insured to be seaworthy, whatever forms an ingredient in seaworthiness is not necessary to be disclosed by the assured to the underwriter, in the first instance, unless information upon the subject be particularly called for; and then the assured must disclose truly what he knows in the respect required. Therefore where the assured of a ship had received a letter from his captain informing him that he had been obliged to have a *survey* on the ship at *Trinidad, on account of her bad character*; but the survey which accompanied the letter gave the ship a good character: held that the non-disclosure of such letter and survey to the underwriters did not vacate the policy; though it appeared in evidence that such circumstance, if known, would have enhanced the premium of insurance.

THIS was an action on a policy of assurance, dated 20th of *April* 1802, upon the ship *Eliza*, lost or not lost, at and from *Trinidad* to *London*, with liberty to call

at

1804.

HAYWOOD *against* RODGERS.

at all or any of the Leeward or Windward Iſlands; wherein the plaintiffs declared upon a loſs by perils of the ſea, and upon the common money counts. The defendant pleaded the general iſſue as to all but the premium declared for in the count for money had and received, as to which he pleaded a tender; on which iſſues were taken. At the trial before *Chambre* J., at the laſt *Lancaſter* aſſizes, the principal queſtion which aroſe was upon the materiality of a certain letter and document, which was received by the aſſured prior to the inſurance being effected, and which was not communicated to the underwriters. The letter was dated on the 29th of *January* 1802, in which the captain informed his owners of his "ſafe arrival at *Trinidad*, after a pleaſant voyage of ſix weeks from *Liverpool;* that he had got his ſhip very clean, and the carpenter had got her all caulked; *that ſhe was in very good order; but that he had had a ſurvey on her on account of her bad character;* that he had two letters from *Martinique*, but no encouragement for freight, as he underſtood *Martinique* was full of ſhipping; but that he had advertiſed for *London*, and expected to ſail in *March*." This letter was accompanied by the document in queſtion, the ſurvey taken at *Trinidad*, which was perfectly ſatisfactory; the ſurveyors *all agreeing that the ſhip was ſufficient to take in her cargo, and proceed to any port in* Great Britain *with ſafety.* In addition to this, the captain and ſhip's carpenter proved that the ſhip failed from *Liverpool* on the 6th of *November* 1801, and arrived at *Trinidad* on the 18th of *December* following in as good condition as when ſhe failed, having met with no accident on the voyage; that ſhe had *Mancheſter* goods on board, which arrived in very good order. That on his arrival the captain applied to a Mr. *Mitchell* for freight, which he declined, becauſe the captain of an

African

1804.

HAYWOOD *against* RODGERS.

African veſſel, which had arrived juſt after the *Eliza*, and *offered to take in a cargo at a lower freight*, had informed him *that the* Eliza *was a very old ſhip and had a very bad character*. In conſequence of this the captain of the *Eliza* had the ſurvey in queſtion made in order to ſatisfy *Mitchell*. And he proved that the ſhip, though 30 years old, was in the good condition deſcribed in that ſurvey. The *Eliza* afterwards ſailed on the 9th of *March* from *Trinidad*, bound to *Martinique*, and on the 18th ſtruck upon a reef of rocks off *Tobago*, which damaged her ſo much that on her arrival at *Fort Royal* in *Martinique*, where it was endeavoured to get repairs, ſhe was found upon examination unfit to come home, and was therefore ſold there for about 89*l.* ſterling only; (having been originally ſold to the plaintiffs for 1200*l.*) owing to the quantity of ſhipping upon ſale there at that time, which ſold then at a very low rate. With ſome ſlight repairs, however, ſhe was rendered fit to navigate in ballaſt to *America*, a paſſage of only 17 days. And it was proved that if ſhe could have got a more ſubſtantial repair of the damage received in her bottom by running on the rocks ſhe was very capable in other reſpects of proceeding ſafely with a cargo to any port of *Great Britain*.

On the part of the defendant it was contended, 1ſt, that the ſhip was not ſeaworthy; and, 2dly, that the policy was avoided by the concealment from the underwriters of the letter of the 29th of *January*, deſcribing that *ſhe had been ſurveyed at* Trinidad *on account of her bad character*. And two underwriters were called to prove that whenever a ſurvey of a ſhip has been made in the *Weſt Indies* it was the conſtant practice to diſcloſe that circumſtance to the underwriters, whatever the reſult of ſuch ſurvey might have been; and that whatever was the

1804.

HAYWOOD *against* RODGERS.

character given of the ſhip therein it never failed to enhance the premium; and ſome underwriters would not then engage on any terms. The reaſon of which opinion and practice they ſtated to be the general inaccuracy of ſuch ſurveys; the taking of which always beſpoke a doubt at leaſt in the minds of thoſe concerned, which made the ſhip always ſuſpected. There was alſo an attempt made in evidence to ſhew that the ſhip was not ſeaworthy. The learned judge, however, thought that the defendant had failed in proving the ſhip not ſeaworthy at the commencement of the riſk; but he conſidered that the aſſured ought to have communicated to the underwriters the fact of the ſurvey having been taken, and the letter incloſing it, which mentioned the circumſtance of the ſhip's having a bad character, in order that they might exerciſe their judgments upon it, in deciding whether they would underwrite at all, or if they did, at what premium; for want of which communication he thought the verdict ſhould be with the defendant. The jury, however, found for the plaintiff. And a rule niſi having been obtained for ſetting aſide the verdict,

Park (and with him were *Topping* and *Littledale*) ſhewed cauſe againſt the rule, and, admitting that every material information known to the aſſured at the time of the inſurance, which might vary the riſk inſured, ought to be communicated by him to the underwriter, contended that the letter and ſurvey ſent from *Trinidad* contained no material information which could juſtly be conſidered as affecting the riſk. The letter indeed ſtated that the ſhip was reported to have a bad character; but the ſame letter, confirmed by the ſurvey, ſhewed that ſuch report had no foundation in fact, and that it probably aroſe from the

1804.

HAYWOOD *against* RODGERS.

interested views of the captain of the *African* ship which arrived at *Trinidad* soon after the *Eliza*, in order to obtain the preference of freight. The opinion given at the trial by the two underwriters called for the defendant, founded on the general inaccuracy of surveys taken in the *West Indies* cannot weigh against the positive proof that the ship was seaworthy: and the reason why the survey was taken was, not because of any doubt entertained of that fact by the captain, but to satisfy the merchant at *Trinidad* of the falsity of the *African* captain's account. The jury might probably think that the opinion expressed by the two underwriters was not founded in general experience. But at any rate these documents were not necessary to be disclosed to the underwriters at the time; because whatever doubts they might have suggested (though without reason) of the seaworthiness of the ship, the assertion of her being seaworthy was no more than is included in the implied undertaking of the assured; and whatever is the subject-matter of warranty, either express or implied, such as seaworthiness, need not be communicated to the underwriters, according to the opinion of Lord *Mansfield* in *Shoolbred* v. *Nutt* (*a*).

Scarlett, (and with him *Erskine* was to have argued) in support of the rule, said that there were different degrees of seaworthiness, which it was material for an underwriter to know, and which, when known, formed in common experience the basis of calculating the quantum of premium. It formed the difference between what were called good and bad risks. On this ground the letter and survey were material to be communicated; for though if

(*a*) Sittings after *Hil.* Term, 1782, *Park on Insur.* 229. *a.*, and vide post, 598. S. C.

the

1804.

HAYWOOD against RODGERS.

the ſuſpicion of the ſhip's bad condition had merely exiſted in the captain's own mind, it might be ſaid to have been done away by the opinion afterwards expreſſed by him and confirmed by the ſurvey, and therefore not material to be communicated to the underwriters; yet the ſame conſequence does not follow when it appears from the letter that the ſuſpicion was general, and that it was not removed by the ſurvey, ſince the ſhip was not able to procure freight in conſequence of it. The underwriters were as much entitled to exerciſe their own judgment on the credit due to the perſons making the ſurvey as thoſe upon the ſpot who diſregarded their report. And the reaſonableneſs of the diſcredit attached in general to ſurveys ſo taken, and acted upon in this inſtance by the merchants of *Trinidad*, is not liable to be removed by the event in this caſe; as it appears that the ſhip, in conſequence of an injury merely partial, was ſoon after ſold for a mere trifle. The materiality of the diſcloſure was ſtrongly fortified by the evidence of the two underwriters at the trial; ſince it appeared that the mere circumſtance of taking ſuch ſurveys in the *Weſt Indies* had in ſeveral inſtances within their experience, which had been very long and extenſive, varied in fact the premium, and with ſome underwriters was a reaſon for declining inſurance altogether.

Cur. adv. vult.

Lord ELLENBOROUGH C. J. now delivered judgment.

This came on upon a rule to ſhew cauſe why there ſhould not be a new trial; in which the only real queſtion, (for ſeaworthineſs did not, according to the Judge's report, make any material queſtion,) was, Whether the aſſured ought to have communicated a letter he had re-

1804.

HAYWOOD *against* RODGERS.

ceived from the captain of the ſhip before the policy was effected; by which letter he was informed that he had been obliged to have a *ſurvey on the ſhip at* Trinidad, from which place the voyage inſured (*i. e.* from *Trinidad* to *London*) commenced, *on account of her bad character?* This letter, containing, as it did, a ſurvey, by which it appeared that all the perſons on the ſurvey had agreed that the ſhip was ſufficient to take in a cargo to proceed to any port in *Great Britain* with ſafety. In *Carter* v. *Boehm*, 3 *Burr.* 1905. Lord *Mansfield* ſays, "The reaſon of the "rule which obliges the party to diſcloſe is to prevent "fraud and encourage good faith: it is adapted to ſuch "facts as vary the nature of the contract, which one pri-"vately knows, and the other is ignorant of and has no "reaſon to ſuſpect." The queſtion therefore muſt always be, "Whether there were, under all the circum-"ſtances at the time the policy was underwritten, a "fair ſtatement, or a concealment, fraudulent if de-"ſigned, or, though not deſigned, *varying materially the* "*object of the policy, and changing the riſk underſtood to be* "*run?*" Applying this, which appears to be a correct rule on the ſubject, to the non-communication in queſtion, did the circumſtance of the letter and ſurvey vary materially the object of the policy, viz. the inſurance of the ſhip for the voyage, or did it vary the riſk itſelf underſtood to be run? in other words, did it render the indemnity a more or leſs hazardous one? It does not appear to have varied either. But it is ſaid, it might have varied the opinion of the underwriter as to the prudence of underwriting ſuch a riſk when it was known that the ſoundneſs of the ſhip had been ſo far queſtioned as to render a ſurvey of the ſhip neceſſary in order to obviate the doubts of perſons from whom the ſhipment of goods on freight

1804.

HAYWOOD *against* RODGERS.

freight was expected. Is it then to be laid down as a principle, that every fact known to the assured with respect to the condition, quality, and circumstances of the ship prior to the period of effecting the insurance, which may possibly guide the judgment of an underwriter in undertaking or refusing to undertake the insurance, is to be communicated to him? It certainly would have some weight in guiding the judgment of an underwriter on such a subject to know how old the ship was, where she was built, whether originally *British* or foreign, what was the form of her construction, whether clinker-built or not, whether copper-bottomed or not, what repairs she had received, and when and in what docks those repairs were done to her, and how lately before the voyage insured; and if the voyage were, as this was, a voyage home, what accidents the ship had met with in her outward voyage. All this may be very proper and convenient for an underwriter to be informed of before he takes upon him the risk; and all this may be asked of the assured; and if he should withhold, upon being asked for it, any material part of such required information, his policy could not be sustained for a moment; for such a suppression would be a fraudulent concealment of material facts, which has always been considered as avoiding the policy. But the question is, Is it the duty of the assured in the first instance, and as a condition precedent on his part, to inform the underwriter of all these circumstances to the extent of his the assured's own actual knowledge on the subject? If it be, and it never yet has been either in theory or practice assumed to be the case, the assured must, before he effects his insurance, collect from all his documents all the materials for the history of his ship, from the moment of her being launched down to that of

1804.

HAYWOOD *against* RODGERS.

fubfcribing the policy. But it is to be recollected that the underwriter virtually is indemnified againft or exempted from the effect of thefe circumftances, whether difclofed or not, as far as they render the fhip not a proper object of infurance: for if on thefe or any other account whatfoever the fhip be not feaworthy at the commencement of the rifk, the underwriter is difcharged from, or rather never incurred, any refponfibility in refpect to it. And therefore in the cafe of *Shoolbred* v. *Nutt*, *Park*, 229. *a.* Lord *Mansfield* held that where the owner had received letters from his captain the day before he effected the infurance, ftating that the fhip had arrived at *Madeira*, but was very leaky, and that the pipes of wine had been half covered with water; which letters were not communicated to the underwriters; Lord *Mansfield* told the jury "That "there fhould be a reprefentation of every thing relating "to the rifk which the underwriter has to run, except it "be covered by a warranty. It is a condition or implied "warranty in every policy, that the fhip is feaworthy; "and therefore there need be no reprefentation of that. "If fhe fail without being fo, there is no valid policy. "Here the leak was ftopped before fhe failed from *Ma-* "*deira*, and fhe failed in good condition from thence, and "there is no occafion to ftate the condition of a fhip or "cargo at the end of the former voyage. Verdict for "plaintiff." Upon this authority, as well as upon the reafon of the thing, and the almoft abfolute impoffibility for the affured to ftate and bring forward (without any fpecific inquiry or requeft for information having been addreffed to him on the part of the underwriter relative thereto,) every thing which if ftated might have been deemed, in the judgment of the underwriter, material to the queftion, whether he fhould underwrite at all, and if

fo,

so, at what premium: We think that an assured having impliedly warranted as he has his ship to be seaworthy, and having concealed no circumstance relative to the seaworthiness of the ship which he was required to disclose, and not having, at the time of effecting the policy, known of any fact which rendered her, with reference to the risk insured, otherwise than seaworthy, is entitled to retain the benefit of that verdict, which a jury, upon consideration of these circumstances, has found in his favour.

1804.

HAYWOOD *against* RODGERS.

Rule discharged.

BRYAN *against* HORSEMAN.

Monday, Feb. 13th.

An acknowledgment of the debt, though accompanied with a declaration by the defendant "that he did not consider himself as owing the plaintiff a farthing, it being more than six years since he contracted," is sufficient to take the case out of the statute of limitations.

IN assumpsit for wheat sold and delivered, the defendant pleaded non-assumpsit, and the statute of limitations. And at the trial before Lord *Ellenborough* C. J. at the sittings after last term, the plaintiff, in order to take the case out of the statute, called the sheriff's officer, who proved that the defendant, on being arrested, said, "I do not consider myself as owing Mr. *Bryan* a farthing, *it being more than six years since I contracted.* I have had the wheat, I acknowledge, and I have paid some part of it, and 26*l.* remains due." On the part of the defendant it was objected, that these expressions amounted to no more than what he had stated upon record in his plea, which confessed the existence of the debt, but avoided it by alleging the lapse of time. His Lordship, however, thought that according to the authorities such an acknowledgment of the existence of the debt must be deemed sufficient to take the case out of the statute, though if the matter had been res integra the point might have admitted of doubt: and accordingly, by his direction, a verdict passed for the plaintiff.

 Bosanquet

1804.

BRYAN *against* HORSEMAN.

Bosanquet on a former day moved to set aside the verdict and have a new trial. The words of the statute 21 *Jac.* 1. *c.* 16. *s.* 3. are express that all actions on the case, &c. "shall be commenced and sued within six years "next after the cause of such actions or suits, and not "after." And in every form of action but that of assumpsit the construction has been in unison with the words and policy of the law. In assumpsit, however, any acknowledgment of the debt within six years as then existing has been holden to take the case out of the statute: which has arisen out of the nature of the action; considering such acknowledgment as evidence of a new promise made on the meritorious consideration of the antecedent debt, and therefore giving a new cause of action distinct from the original consideration. The issue there joined is upon *the promise* within six years; and therefore whatever amounts to evidence of such a promise in fact is sufficient to maintain the affirmative of the issue. If there be a simple acknowledgment of the debt as then existing, a promise to pay it may be implied from the reason and justice of the thing, and the presumed intention of the party making it. But that implication or presumption may be rebutted, and cannot apply to an acknowledgment accompanied with a positive declaration that the party did not consider himself bound in law to pay the debt; otherwise the very plea of non assumpsit infra sex annos, which is an acknowledgment of the antecedent debt, might be strained into a promise. But if an acknowledgment and an avoidance, when put in the form of a plea upon the record, be a good defence, it cannot overset the plea when tendered as evidence. In this case the presumption of a new promise, which might arise from the acknowledgment if it stood alone, is rebutted

by

1804.

BRYAN *against* HORSEMAN.

by the concomitant avoidance. In *Dickson* v. *Thompson* (a) it was ruled that though a promise within six years would evade the statute of limitations, yet a bare acknowledgment of the debt would not. And this was solemnly decided by all the Judges in *Heylin* v. *Hastings* (b); but they held that it was evidence of a promise to go to the jury, and *Rokeby* J. compared it to the case of trover and conversion, where a demand and refusal are holden to be evidence of a conversion, but not a conversion in themselves. The same doctrine is adopted by Mr. Justice *Buller* in his *Nisi Prius*, 148., who, in addition to *Heylin* v. *Hastings*, cites the case of *Owen* v. *Wolley*, *Salop*, 1751, where, in an action by an executor for money had and received to the use of the testatrix, the defendant was proved to have said, "I acknowledge the receipt of the money, *but the testatrix gave it to me*." On which *Clive* B. directed the jury to find for the defendant; for such an acknowledgment could not amount to a promise to pay when the defendant insisted that he was entitled to retain. Lord *Mansfield*, indeed, in the subsequent case of *Trueman* v. *Fenton* (c), said that the slightest acknowledgment has been holden sufficient to take a case out of the statute, such as, "Prove your debt and I will pay you;" or, "I am ready to account, but nothing is due to you." But it does not appear from thence whether he considered an acknowledgment as setting up the old promise, or as evidence of a new one. If only the latter, it must, like all other matters of evidence, be capable of being rebutted. And indeed the first instance put by him is the very ac-

(a) 2 *Show.* 126.
(b) 1 *Ld. Raym.* 421. *Carth.* 470. 5 *Mod.* 426., and 12 *Mod.* 223.
(c) *Cowp.* 548.

knowledgment

1804.

BRYAN *against* HORSEMAN.

knowledgment which was the ſubject of diſpute in *Heylin* v. *Haſtings*, and ſhews that he had that caſe in view at the time; and there, according to the report of *Carthew*, it was expreſsly conſidered that the acknowledgment of the debt was "evidence of a new promiſe." And the ſecond inſtance put by him is, properly ſpeaking, no acknowledgment, but rather a denial of a debt, with a new promiſe, however, to pay whatever ſhould appear due upon taking an account. In *Yea* v. *Fouraker* (*a*), the defendant, who had been ſurety in a note for another, ſaid, after ſix years, "you know I had not any of the money myſelf, but I am willing to pay half of it." And this, according to the report in *Buller's Ni. Pri.* was holden to be a promiſe ſufficient to take the caſe out of the ſtatute; and, according to the report in *Burrow*, it was a ſufficient acknowledgment for that purpoſe, though made after the action commenced. But whether taken as a diſtinct promiſe or only as evidence of it, it was a complete recognition of the original tranſaction, unaccompanied with any excuſe or refuſal to pay, and, on the contrary, expreſſive of a willingneſs to pay *half*: but the queſtion as to the quantum did not ariſe, as the jury had found for the defendant, and the Court granted a new trial generally. But taking it even as an acknowledgment, and ſo only evidence of a promiſe, it muſt be evidence of it at any period within which the debt is acknowledged to be due, that is between ſuch acknowledgment and the original conſideration. So in *Lawrence* v. *Worrall* (*b*), the defendant's ſaying to the plaintiff, "what an extravagant bill you have delivered me," was ruled by Lord *Kenyon* to

(*a*) *Bull N P.* 149. and 2 *Burr.* 1099.

(*b*) Sittings after *Mich* Term, 32 *Geo.* 3, *Peake's Ni. Pri. Caſ* 93

be

1804.

BRYAN *against* HORSEMAN

be an acknowledgment of *some* money being due, to take the case out of the statute, though accompanied by a refusal to refer the demand to arbitration. But the defendant there neither insisted upon any excuse for the whole, nor indeed refused to pay what in his opinion was a reasonable charge. The strongest case is that of *Clarke* v. *Bradshaw and Coghlan* (a), where the defendant *Bradshaw* saying "that the plaintiff had paid money for him twelve years ago, but that he had since become a bankrupt, by which he was discharged, as well as by law, from the length of time the debt accrued," was, by the same learned and noble Judge, deemed to take the case out of the statute. But as a direct acknowledgment was also proved to have been made by the other defendant, the partner of *Bradshaw*, the plaintiff was at all events entitled to a verdict; which accounts for the point not having been afterwards moved in court: and further, Lord *Kenyon* is there said to have so decided upon the authority former cases; but none of those, upon examination, appear to warrant the doctrine to this extent.

The Court, after some hesitation, granted a rule to shew cause; but when *Garrow* and *Wigley* were to have shewn cause on this day,

Lord ELLENBOROUGH C. J. said that they had looked into all the authorities; and that whatever their opinion upon the statute might have been had the question been new, yet, after the long train of decisions upon the subject, it was necessary to abide by the construction which had been put upon it; in conformity with which they thought themselves bound to hold that

(a) Sittings after *Easter* Term, 40 *Geo.* 3 3 *Esp. Ni. Pri. Cas.* 155, 7.

what

1804.

Bryan *against* Horseman.

what was said by the defendant was a sufficient acknowledgment of the pre-existing debt to create an assumpsit, so as to take the case out of the statute.

Rule discharged (*a*).

(*a*) *Rucker* v. *Sir Samuel Hannay*, *B. R. Tr.* 29 *Geo.* 3. MS The defendant had stated to the Court, in an affidavit for leave to plead the statute of limitations, that "*since the bill of exchange* (on which the action was brought) *became due*, (which was more than six years before) *no demand for payment had been made on him*;" and this was deemed sufficient to be left to the jury as an acknowledgment; and the jury having found a verdict for the plaintiff, the Court refused to grant a new trial. And vide *Lloyd* v. *Maund*, 2 *Term Rep.* 760.

Monday, Feb. 13th.

The King *against* The late Sheriff of Middlesex.

The same sheriff, by whom any writ directed and delivered to him is executed while in office, ought to make his return to the same, and hand such writ and return over to the new sheriff, who comes into office before the return day; and such new sheriff will return the writ with the old sheriff's return thereon. And if the old sheriff, after arresting a defendant, suffer him to escape, and go out of office before the return day, he alone is answerable for the escape.

A Rule was obtained calling on the prosecutor to shew cause why the writ of attachment issued against the late sheriff of *Middlesex*, for not bringing in the body, and also the habeas corpora requiring the present sheriff to bring into court the late sheriff of *Middlesex*, should not be set aside for irregularity with costs, and proceedings in the mean time stayed. The facts were, that *Pugh*, the defendant in the original cause, was arrested in *September* last by the late sheriff, on a bill of *Middlesex* issued in the last long vacation, and was seen at large again the latter end of the same month. On the 7th of *November* the late sheriff was ruled to return the writ, whereupon *the present* sheriff, who had never had *Pugh* in his custody, *returned cepi corpus*, and then the *late* sheriff was, on the 12th of *November*, ruled to bring in the body, and afterwards the attachment in question issued against the *late* sheriff, who had made no return. But no objection was taken to the irregularity till the 27th of *January*.

Hullock,

1804.

The King *against* The late Sheriff of Middlesex.

Hullock, in support of the rule, contended that the rule of Court, *Tr.* 31 *Geo.* 3. (*a*), shewed that the attachment could only issue against that sheriff who had returned cepi corpus; though it might issue against him notwithstanding he was out of office before he was ruled to bring in the body. And that the practice was for the late sheriff to make over to the new sheriff on his coming into office all his prisoners and all writs not returned, and the returns were made by the new sheriff.

Erskine and *Wigley*, on the other hand, contended that it was the duty of the late sheriff, by whom the defendant had been arrested, to have made the return of cepi corpus; and that such return by the present sheriff was a mere mistake, which ought not to bind him. That in strictness the return ought always to be made by the sheriff to whom the writ was directed and delivered, and not by one who was a stranger to it: that otherwise no proper return could be made in a case where the writ having been directed to the late sheriff and the party arrested by him, he had afterwards suffered an escape; for the new sheriff, to whom the writ was delivered over, could not be bound to return cepi corpus where the defendant had never in fact been in his custody, and if he returned non est inventus, such return would not be true in regard to the late sheriff.

The Court ordered the matter to stand over for further inquiry as to the practice, and to look into the authorities. And on this day

(*b*) 4 *Term Rep.* 379.

Lord

1804.

The KING
against
The late Sheriff
of MIDDLESEX.

Lord ELLENBOROUGH C. J. delivered the opinion of the Court.

In ſtrictneſs a ſheriff ought to return every writ directed and *delivered* to him. Rule *E.* 6 *Jac.* 1. 1608. And the new ſheriff is not chargeable with ſuch things which are executed before they are delivered over to him by the old ſheriff. *Cro. Eliz.* 365. For if the old ſheriff take a man in execution, and afterwards a new ſheriff be made, and before the old ſheriff deliver his priſoner to the new ſheriff the priſoner eſcape, the old ſheriff only is chargeable for the eſcape; for the new ſheriff ſhall not be chargeable for any other priſoners than what are delivered over to him by indenture. *Hob.* 266. 1 *Bulſtr.* 70. 79. 2 *Leon.* 54. If a writ directed to the ſheriff be executed, and afterwards a new ſheriff be elected, *the ſucceſſor* (if the writ be returned over to him) *ought to return* the writ *with the old ſheriff's return thereon*, and that he received the writ as above indorſed from his predeceſſor. 2 *Roll. Abr.* 457. *Dalt.* 516. 1 *Bulſtr.* 70. Now the rule is for the late ſheriff to make his return. In 3 *Rep.* 72. *Weſtby*'s caſe, it is reſolved that after the election of a new ſheriff, and before delivery over of the priſoners to him, they do remain in the cuſtody of the old ſheriff, *and after the delivery of them over to the new ſheriff* he at the day of the return *ought to return cepi corpus*. So in *Style's Prac. Reg.* p. 587., a ſheriff out of his office cannot be fined by a Court, but a tipſtaff may be ſent for him to bring him to anſwer a miſdemeanor committed by him when he was in his office, although the proceſs which the law allows againſt him when he is out of his office is a diſtringas nuper vic., and diſtringas after diſtringas until he doth appear. 22 *Car. B. R.* And by another rule of

1804.

The KING *against* The late Sheriff of MIDDLESEX.

Court, *T.* 31 *Geo.* 3. (*a*), "Where a ſheriff, before going out of office, ſhall arreſt a defendant, and a cepi corpus ſhall afterwards be returned, he ſhall and may, within the time allowed by law, be called upon to bring in the body by a rule for that purpoſe, notwithſtanding he may be out of office before ſuch rule ſhall be granted."

The Court therefore, upon the whole, held the attachment irregular in this caſe againſt the late ſheriff, he having made no return; but that the irregularity had been waved by moving ſo late to ſet it aſide.

Rule diſcharged.

(*a*) *R.* and *O.* of *B. R.* 48.

HECKSCHER and Others *againſt* GREGORY.

Monday, Feb. 13th.

In an action on the ſtockjobbing act 7 *Geo.* 2. *c.* 8. *ſ* 6. to recover damages againſt one who had refuſed to accept and pay for ſtock agreed to be ſold to him, it is neceſſary to prove an actual transfer of the ſtock to ſome other perſon before the action brought; and proof alone of a contract to ſell to ſuch other perſon before the action brought, though followed up by an actual transfer afterwards, is not ſufficient to ſuſtain the action.

IN an action on the caſe, framed on the ſtat. 7 *Geo.* 2. *c.* 8., to recover the difference of ſtock, the plaintiffs declared that at the times of making the ſeveral ſales and offers of transfer aftermentioned, viz. on 5th of *May* 1803, they were entitled to the intereſt or ſhare of 1000*l.* ſtock 3 per cent. cons., ſtanding in the books of the Bank of *England* in the name of *Daniel Eliaſon* as their truſtee; and being ſo entitled, it was agreed between them and the defendant, that the plaintiffs bargained to ſell and the defendant to buy of them their intereſt in the ſaid ſtock, at the price of 70¾*l.* for money, and the ſaid ſtock was to be *transferred* on that day into the name of the defendant, and he was then to pay the price of the ſame to the plaintiffs: and the ſaid agreement being ſo made, afterwards, &c. in conſideration that the plaintiffs, at the inſtance of the defendant, had promiſed to perform the ſaid agreement in every

1804.

HECKSCHER *against* GREGORY.

every thing on their parts to be performed, the defendant promifed to the plaintiffs to perform every thing on his part, &c. The plaintiffs then averred that they, on the faid 5th of *May* 1803, *were ready and willing to transfer* the ftock at the price aforefaid and in purfuance of the *faid fale*, and did then and there, in due manner *tender and offer* to transfer the fame, &c. to the defendant, according to the *faid fale*, and to make the proper entries, &c. in the books of the bank, &c., of all which premifes the defendant then and there had notice, and was then and there requefted to accept and pay for the faid ftock, but the defendant then and there and from thence hitherto has refufed to accept the faid transfer, or take the intereft *fo fold* to him, or pay for the fame, *according to the faid fale*. And then the plaintiffs averred that from the time of their making fuch tender and offer as aforefaid until the commencement of this fuit they were unable to fell the faid ftock, or any part of it, at or for the price or rate aforefaid. And the plaintiffs afterwards, and before the commencement of this fuit, viz. on the 9th of *June* 1803, *fold* the faid ftock at a lefs price than aforefaid, viz. for 58¾*l.* per cent. &c. There were other counts laying the fame tranfaction in different ways: concluding to the plaintiffs' damage, &c.

At the trial before Lord *Ellenborough* C. J. at the fittings after laft term, at *Guildhall*, it appeared that the plaintiffs, who refided abroad, had written to their agent Mr. *Eliafon*, on the 22d of *April* 1803, advifing him to fell out their ftock as foon as ftocks rofe to a certain price. And an opportunity offering for this purpofe, on the 5th of *May*, upon intelligence then fuppofed to have been communicated by one of his Majefty's Secretaries of State to the Lord Mayor of *London*, purporting that all differences

 fubfifting

1804.

HECKSCHER *against* GREGORY.

fubfifting between this country and *France* were happily terminated; (a letter which very foon afterwards turned out to be a forgery;) in confequence of which the ftocks fuddenly rofe to 70¼*l.*, *Eliafon*'s broker contracted for the fale of the ftock at that price to the defendant, and a transfer was on the fame day directed to be made to him, and the ticket neceffary for making the transfer was given in at the Bank. But before fuch transfer could be made the fraud was difcovered, and the defendant refufed to execute his bargain, though the ftock was formally tendered to him on the fame day. In confequence of the defendant's refufal, *Eliafon* wrote to his principals abroad, the plaintiffs, and on the receipt of their anfwer the plaintiff's broker received directions to fell the ftock on the 9th of *June* following, and a contract of fale was then accordingly made to a Mr. *Cope* for 57¼*l.* ex div.; but as the ftocks were then fhut no transfer could be made, nor was any in fact made till the opening on the 6th of *July* 1803. The declaration was of *Trinity* term laft, nd the memorandum on the Nifi Prius record was of the 25th of *June*, to which day of courfe the commencement of the action related. Lord *Ellenborough* C. J. was of opinion that an actual refale and transfer were neceffary by the ftat. 7 *Geo.* 2. *c.* 8. to the maintenance of the action, and that the mere contract of fale which took place on the 9th of *June* was not fufficient in itfelf without the actual transfer, which was the completion of the fale, which was not made till after the commencement of the action: he therefore nonfuited the plaintiff. And on a former day of this term a rule nifi was obtained for fetting afide the nonfuit and having a new trial. Which was moved on the grounds, 1ft, that an actual transfer was not neceffary to fupport the action; or, 2dly, if it were,

1804.

HECKSCHER *against* GREGORY.

yet that, when made, it would relate back to the time of the *sale*, which was before the action, and the only thing required by the statute to sustain the action.

Gibbs (and *Marryat* was to have argued on the same side) shewed cause against the rule. This action is framed on the 6th clause of the stat. 7 *Geo.* 2. *c.* 8. which enacts, "that no person who shall sell any stock to be delivered "and paid for on a certain day, and which shall be refused "or neglected to be paid for according to such agreement "shall be obliged to *transfer* the same," (that is, to the person so refusing to pay for it): "but it shall be lawful for "such person to *sell* such stock which shall be so refused "or neglected to be paid for to any *other* person for the "best price which can be obtained: and *after such sale* to "receive, (if the parties can agree,) or to recover as afore-"said from the person who first contracted for the same "all the damage which shall be sustained thereby." Now as well from the reason of the thing as from comparing this with the antecedent and subsequent clauses, it appears that *sale* must mean *transfer*; because till the actual transfer of the stock, or the delivery of it to the purchaser, the sale is not complete; it is only a contract for sale; it rests in fieri. The sale is not of any specific thing; but it would be a sufficient performance of such a contract though the holder had sold his own stock to another than the one with whom he first contracted, provided by the purchase of new stock of the same denomination he was enabled to make good his bargain in time by transferring it to the first contractor. So in *Butterfield q. t.* v. *Windle* (*a*), the sale of coals was holden to be in that county where the contract was performed and the delivery made,

(*a*) *Ante*, 385

and

and not where the contract of ſale only took place. Beſides, the policy of the act was to prohibit mere gambling ſpeculations on the price and fluctuations of ſtock, without any real purchaſes taking place. This could only be inſured by requiring an actual transfer of the ſtock previous to any recovery of damages either for the not delivering or not paying for it. By the 5th clauſe, therefore, it is ſtipulated, "for preventing the evil practice of com-"pounding or making up differences for ſtocks bought, "ſold, or agreed ſo to be," that no money or other conſideration be paid, &c. for the compounding, &c. any difference "for the not delivering, transferring, having, "or receiving" any ſtock, &c. "or for the not perform-"ing of any contract or agreement ſo ſtipulated and "agreed to be performed; *but that every ſuch contract and* "*agreement ſhall be ſpecifically performed and executed on all* "*ſides*, and the ſtock or ſecurity agreed to be *aſſigned*, "*transferred, or delivered*, ſhall be actually ſo done, and "the money or other conſideration thereby agreed to be "given for the ſame ſhall alſo be *actually and really given* "*and paid*," &c. If the act had ſtopped there, one who had agreed to ſell to another who was unwilling to perform his part of the contract would have been left without remedy; becauſe, if the contract were at all events to be ſpecifically performed before he was entitled to recover his damages, he muſt firſt have gone into a court of equity. To remedy which, without invading the principle of the ſtatute, the 6th clauſe was framed, which ſubſtitutes an actual ſale and transfer to another purchaſer in lieu of that to the original contractor, and then enables the ſeller to recover the difference, if any, in damages. But unleſs an actual transfer were required the whole policy of the act would be defeated; for then the ſeller

 might,

1804. HECKSCHER *against* GREGORY.

might, after recovering the difference, ſtill retain the ſtock which he had contracted to ſell, and under ſuch a cover effect would be given to thoſe ſpeculations, unfounded on any real tranſactions, which the legiſlature meant to prohibit by the 5th clauſe (*a*). This conſtruction is rendered ſtill more evident by the 7th clauſe, which provides " that " it ſhall be lawful for any perſon who ſhall buy any ſtock, " &c. to be accepted and paid for on a future day, *and* " *which ſhall be neglected or refuſed to be transferred*, to buy " the like quantity of ſuch ſtock of any other perſon at the " current market price, and to recover, and receive, *after* " *ſuch purchaſe and acceptance*, (if the parties can agree), " from the perſon who firſt contracted to ſell or deliver " the ſame, the damage which ſhall be ſuſtained *by reaſon* " *of the not delivering or not transferring* ſuch ſtock or other " ſecurities." If then the transfer of other ſtock be ſpecifically required to be made to the buyer under the 7th clauſe, to enable him to recover damages againſt the ſtock owner who had originally contracted to ſell to him, and who had not performed his contract, that ſhews what ſort of ſale was meant in the 6th clauſe to be made by the ſtockholder who had contracted to ſell to one who had refuſed to accept the ſtock, in order to entitle ſuch ſtockholder to recover the difference, namely, a ſale perfected by an actual transfer.

Erſkine (with whom *Garrow* and *Wigley* were to have argued) in ſupport of the rule, admitted that if in conſequence of the neceſſity for Mr. *Eliaſon* to write to the plaintiffs abroad, and to wait their anſwer till the 9th of

(*a*) The words of this clauſe are, that " no money or other conſideration " whatſoever (except, &c.) ſhall be *voluntarily* given, paid, &c. for the " compounding, &c. any difference for the not delivering, &c. ſtock."

June,

1804.

HECKSCHER *against* GREGORY.

June, the ſtocks had riſen at any period in the mean time to as high a price as that which the defendant had contracted to give, by which the plaintiffs would have been enabled to have ſold out without incurring any loſs, it might have been an anſwer to this action for the difference of the price at which they actually ſold their ſtock on the 9th of *June*: but they could not have ſold for more than they did on any intermediate day; and as the difference was the true meaſure of damage, that muſt relate to the time of the ſale agreed to be made, and not to the ſubſequent transfer in purſuance of ſuch ſale. The contract of ſale, therefore, was the only criterion of the damages, and the operative words of the 6th ſection refer only to the ſale, and not to the transfer; and the requiring of a transfer in other clauſes more ſtrongly marks the difference. If the ſtatute had ſtopped at the 5th clauſe the ſtockholder, before he could have had his remedy, muſt have transferred his ſtock into the name of one who was perhaps an inſolvent; to remedy which inconvenience the 6th ſection was made, which regards merely the contract of ſale and not the actual transfer: and it ſpeaks of perſons who ſhall *ſell* ſtock *to be delivered* and paid for *on a certain day*; and in caſe the buyer refuſes to make good his bargain, it enables the ſtockholder to ſell to any other, and *after ſuch ſale* to receive or recover the difference. The legiſlature, therefore, ſo far conſidered that there might be a *ſale* diſtinct from a *transfer* of ſtock, that it enables the holder, in caſe of a ſale to one who will not pay, to with-hold the transfer and ſell to another; and this would hold good as well in regard to the ſecond as the firſt ſale. The uſe of requiring the ſale was to aſcertain the meaſure of damage, and the party to whom it was ſold would of courſe compel the transfer to

 be

1804.

HECKSCHER *against* GREGORY.

be made; otherwife, by the 7th fection, he may in his turn buy the like quantity of another, and recover the difference. But fuppofing a transfer to be neceffary, yet when made it will have relation to the time of the fale, fo that the Court may be affured at the trial that the fale itfelf was real, and not pretended only, in evafion of the act.

Lord ELLENBOROUGH C. J. The object of the act was to prevent radically all dealings in ftock by perfons who were not proprietors, and who fhould not actually make a transfer of their intereft in the ftock. And, therefore, to entitle the proprietor to recover damages in any cafe for the non performance of a contract for the purchafe of his ftock, he muft either fpecifically carry that contract into execution by firft making a transfer to the party with whom he contracted, according to the 5th fection; or, in cafe of the infolvency or inability of the latter, by firft making an actual transfer to a fubftituted purchafer, according to the provifion of the 6th fection, and then he may recover the difference againft the original contractor. But in no cafe fhall any confideration be voluntarily paid for the compounding any difference for the not transferring ftock; but there muft be an actual transfer: and then the difference between the purchafe-money contracted for and that actually received fhall be the meafure of the damage to be recovered. The 5th fection requires that the contract fhall be fpecifically performed: but that cannot be faid to be a fpecific performance where any thing executory remains to be done. The ftock agreed to be affigned, *transferred*, or delivered, fhall be *actually fo done*. The money too agreed to be given fhall be *actually and really given or paid*. The 6th fection merely enables the

the proprietor to fubftitute another purchafer in lieu of him with whom he had contracted, and who had refufed or neglected to pay for the ftock; but that is to be done in the fame manner, by an actual fale and transfer; and then the price actually paid, compared with that which was contracted to be paid, is to form the meafure of damages for the non-performance of the original contract. The act fays that *after fuch* fale the party fhall *receive* or recover the damage; but that cannot be till after the completion of the contract of fale, which is by the transfer. In each cafe provided for by the act there muft be a fpecific contract of fale *executed*: and when the contract of fale is thus perfected, the difference is that which the party is entitled to recover in damages againft the perfon with whom he had contracted, and who had refufed to perform his contract. The words are "That no perfon who fhall *fell* any ftock," &c. There, indeed, the word *fell* is not ufed in its proper fenfe, as denoting a perfect and complete fale, but in a loofer fenfe, as denoting a contract for fale, an inchoate fale as it may be called, one to be perfected afterwards by an actual transfer: for the claufe goes on to fay that no perfon who fhall fell ftock "to be "delivered and paid for on a certain day, and which fhall "be refufed or neglected to be paid for according to fuch "agreement, *fhall be obliged to transfer the fame;*" but he may *fell* fuch ftock to any other perfon, &c. and *after fuch fale*, receive or recover from the firft contractor the damage fuftained by his breach of contract. But the whole context and fpirit of the act fhews that by the word *fale* in the latter part was meant not merely a contract of fale, but a fale properly fo called, followed up and perfected by an actual transfer: for otherwife the whole policy of

1804.

HECKSCHER *against* GREGORY.

the act might be defeated, as a man might make twenty contracts of sale of the same stock, and satisfy the words of the act by stipulating for as many contracts of resale, paying or receiving the difference, without the stock being ever actually transferred out of his own name. But there can be but one *transfer* of the same stock; and that was the security intended by the legislature for the reality of the transaction. Here it unfortunately happened, that the stock was shut at the time when the contract of sale was made, in consequence of which no transfer could be made of it at the time; but we cannot supply the omission; and for want of such transfer before the action brought the requisite of the act has not been complied with, and the plaintiff cannot sustain his action.

GROSE J. The statute was meant to prevent all gambling speculations in the stocks, and that damages for non-performance of contracts for the sale of stock should only be computed upon real transactions. And for this purpose no method could be more effectual than requiring an actual transfer of the stock before any action for damages for the breach of any contract for the sale of it could be maintained. And this is what the act requires to be done. Therefore, where stock has been contracted to be sold, and it is afterwards refused to be accepted and paid for, the act requires that it shall first be sold to some other person before any action can be brought for the breach of the first contract. This, from the whole view of the act, and comparing the several clauses together, must be meant of a sale followed up and perfected by an actual transfer; without which the object of the legislature could not be attained.

LAWRENCE

1804.

HECKSCHER *against* GREGORY.

LAWRENCE J. The 6th ſection, it muſt be confeſſed, is rather awkwardly worded; for though in other parts of the act the transfer is expreſsly mentioned, yet it is not in terms required in that part of the clauſe on which this queſtion ariſes. A contract of ſale may indeed be complete before the transfer of the ſtock; and by virtue of ſuch a contract the owner would be compellable to make a transfer in order to complete the ſale: and ſo the act conſiders it: for if the buyer neglect or refuſe to pay for his bargain, the act abſolves the ſeller from transferring the ſtock to him: And in that ſenſe the ſale and the transfer of the ſtock may be different. Yet taking the whole act together, the legiſlature, by the word *ſale* ("after ſuch ſale,") muſt have intended a ſale followed up and perfected by a *transfer*, otherwiſe the object of the law might be defeated. The 5th ſect. provides for the caſe between the original parties to the contract; and there there is an expreſs proviſion that the ſtock ſhall be *transferred*. The 6th ſection provides for the caſe where the ſtock is refuſed to be paid for by the buyer: and it enables the ſeller to with-hold the transfer and ſell to another; and, after ſuch ſale, gives the remedy for damages againſt the original contractor. Still keeping in view, therefore, the neceſſity of a real tranſaction, this clauſe merely enables the ſeller to ſubſtitute another purchaſer in lieu of the firſt, who had made default in payment: and it is clear by the 5th clauſe that there muſt have been a transfer to him. Then again under the 7th ſection, which gives a remedy to the buyer to whom the ſtock is refuſed to be tranſferred, it is clear that no action can be maintained till after the purchaſe *and acceptance* of other like ſtock; and the damages are given againſt the ſeller for not *delivering*

1804.

HECKSCHER *against* GREGORY.

or transferring the ſtock or other ſecurities. Therefore, conſtruing the whole together, it is evident that the legiſlature meant that the actual transfer of the ſame or other ſtock ſhould precede the action for the recovery of damages for the not buying or not ſelling ſtock contracted to be bought or ſold. There could be no reaſon for putting the buyer and ſeller in different ſituations with regard to their reſpective remedies for a breach of the ſame contract; more eſpecially as it is evident that the legiſlature looked to the actual transfer of the ſtock as the means to provide againſt gambling ſpeculations.

Le Blanc J. It is no uncommon thing in the conſtruction of ſtatutes to give different meanings to the ſame word uſed in different parts of an act, where it is clear that it is uſed in a different ſenſe. Here the legiſlature, in the firſt part of the 6th clauſe, has uſed the word *ſell* to mean a *contract to ſell*, and in the latter part they have uſed it to mean a ſale completed by a transfer. And this is evident from comparing that with the 5th and 7th clauſes. The object of the legiſlature certainly was to prevent gambling tranſactions in the funds by perſons making pretended bargains for the purchaſe of ſtock, when no ſtock was in fact transferred, but only the differences of the prices ſettled at the appointed times. It therefore provided that no perſon ſhould be entitled to recover damages againſt another as for refuſing to buy or ſell ſtock except there was a convincing proof given that the parties were fair and bona fide buyers and ſellers of the ſtock, by their having reſpectively put themſelves fairly into the condition they aſſumed to contract for, by an actual transfer in the caſe of a ſeller of the ſtock

6 which

1804.

HECKSCHER *against* GREGORY.

which he had contracted to sell, or in that of a buyer by the actual acceptance and receipt of the same quantity of stock which he had before agreed to purchase. And such transfer was looked to as the criterion of a fair transaction for the purchase or sale of stock. For otherwise a man who had made one contract for sale which had been broken, and for which he sought to recover damages, might make a contract for the sale for the purpose of trying his cause and ascertaining his damages, with a stipulation for a resale of the same stock to him after the purpose was answered. And thus, after all, the case would turn out to be one of those very transactions which the legislature meant to prevent.

Rule discharged.

END OF HILARY TERM.

AN

INDEX

OF THE

PRINCIPAL MATTERS.

---

of contract in not giving such bill. *Mussen* v. *Price and another*, *T.* 43 G. 3. 147

S. P. in *Miller* v *Shawe*, *Lancaster* Lent assizes, 1801, cor. *Chambre* J. But after the time of credit expired indebitatus assumpsit lies. *ib.*

2. Where a carrier gives notice to his customers that he will not be accountable for any parcel, &c. *of more than* 5l. *value*, *unless entered as such and paid for accordingly*; if a parcel be sent *above* that value, without being entered and paid for *as such*, and it be lost, the owner is not entitled to recover any thing. *Izett* v. *Mountain*, *M.* 44 *G.* 3. 371

AGENT.

See Trover, No. 3.

AGREEMENT.

See Insurance, No. 5 and 6. Respondentia.

1. *A.* agrees by parol to sell an estate to *B.* on certain terms, provided *B.* will continue *C.* his tenant, *not for one year only*, *but from year to year*, (*C.* having just before been let into possession under a contract for the purchase of the estate, which he had failed to pay for in time, and had theretofore forfeited his deposit;) and *A.* thereupon agreed to take *C.*'s forfeited deposit as part of the purchase-money: *A.* and *B.* afterwards reduce their agreement respecting the purchase into writing, in which no notice is taken of the stipulation concerning *C.*'s tenancy; yet held, that this stipulation, being collateral to the written agreement, was binding upon *B.*; and that the agreement operated as a tenancy for two years certain at least, though no rent was then mentioned, but was to be settled afterwards; and that the tenancy could not be put an end to at the end of the first year by six months' previous notice to quit. *Denn on the demise of Jacklin* v. *Cartwright*, *T.* 43 G. 3 31

2. A contract entered into by a practising attorney to relinquish his business and recommend his clients to two other attornies for a valuable consideration, and that he would not himself practise in such business within certain limits, and would permit them to make use of his name in their firm for a certain time, but without his interference, &c. was holden to be valid in law. *Bunn*, *Executor of Bunn*, v. *Guy*, *M.* 44 G. 3. 190

3. A trust-deed is proposed to the creditors at large of an insolvent, whereby they all engage to accept payment of their *whole* debts *by certain instalments*, the four first of which are to be *guaranteed* by collateral security, the two last to remain *upon the single security of the insolvent:* several of the creditors refuse to sign unless the plaintiffs do; and the plaintiffs stipulate privately with the insolvent as the condition of their signature that he shall procure them collateral security *for the two last instalments* as well as the prior ones; conceiving that they had collateral security originally to cover their debt; and upon the faith of such private agreement they sign the general trust-deed, which is then signed by the rest of the creditors: held such private agreement a fraud upon the other creditors, and void; although the effect of it were not to secure to the plaintiffs the payment of more money than the other creditors were to receive, but only further security for the same sum. *Leicester and another* v. *Rose*, *M.* 44 G. 3. 372

4. School-money for the education, &c. of the defendant's son, payable half-yearly, is not a *debt due* till the end of the half-year, so as to be prove-

proveable under a commiſſion of bankrupt againſt the parent, who became bankrupt a few days before the end of the half-year; though he had, juſt before his bankruptcy, taken his ſon home *for the holidays*; the contract not being thereby put an end to: and conſequently the bankrupt's certificate, under the ſtatute 5 *G*. 2. *c*. 30., is no bar to an action againſt him for the half-year's education, &c. The ſtat 7 *G*. 1. *c*. 31. *ſ*. 1., which enables debts payable at a future day to be proved under the commiſſion, is confined to *written* ſecurities. *Parſlow* v. *Dearlove*, *H*. 44 *G*. 3. 438

5. On the defendant's arreſt his attorney procured his enlargement by undertaking to give a bail-bond to the ſheriff in due time; which he afterwards neglected to do; and the plaintiff recovered againſt the ſheriff for the eſcape: held that ſuch undertaking being contrary to the ſtat. 23 *H*. 6. *c*. 9. the Court would not proceed ſummarily againſt the attorney to make him pay the debt and coſts for his breach of faith. *Sedgworth* v. *Spicer*, *H*. 44 *G*. 3. 508

ALIEN.

No matter of defence ariſing after action brought can properly be pleaded in bar of the action generally, but it ought to be pleaded in bar of the *further maintenance* of the ſuit. Therefore where one who was an alien *amy* at the time of the action brought became an alien *enemy* before plea pleaded, and the defendant pleaded that the plaintiff ought not *to have or maintain* his action, becauſe he was before *and at the time of exhibiting his bill*, and that he *now* is an *alien enemy*, &c.; concluding that therefore the plaintiff ought to be barred from *having or maintaining his action*, &c. To which the plaintiff replied, that *at the time of exhibiting his bill* he was an *alien amy*; wherefore he *prayed judgment and his damages*: to which there was a demurrer: held that the plea was ill pleaded. But yet, as the Court were ex officio bound to give ſuch judgment as appeared upon the whole record to be proper, without regard to the iſſues found or confeſſed, or to any imperfection in the prayer of judgment on either ſide; and as it appeared upon the whole that the plaintiff was *now* an alien *enemy*, and therefore incapable of *maintaining further* his ſuit, judgment was given that he be barred from *further having or maintaining his action*. *Le Bret* v. *Papillon*, *H*. 44 *G*. 3. 502

AMENDMENT.

1. If the award of the writ of inquiry on the roll be right, the teſte of the writ, if wrong, ſhall be amended by it. *Johnſon* v. *Toulmin*, *T*. 43 *G*. 3. 173

2. After verdict of guilty upon an indictment on the ſtat. 9 *Ann*. *c*. 14. for an aſſault on account of money won at gaming, the return to the writ of certiorari which had been iſſued at the inſtance of the defendant was amended by inſerting in the return of the caption the true time when, and the names of the juſtices before whom, the quarter ſeſſions at which the indictment was found was holden, and the names of the jurors by whom it was found. And the entry-roll and record of Niſi Prius were alſo amended, as to the caption of the indictment, (but not as to the names of the grand jurors,) by making the ſame agree with the caption ſo amended. *Rex* v. *Hill Darley*, *T*. 43 *G*. 3. 174

3. A return to a writ of certiorari iſſued at the inſtance of the defendant

was

was amended by inferting therein the commiffion of oyer and terminer by virtue of which, and alfo the names of the juftices by whom, the Court before whom the indictment was found was holden, on production of the faid commiffion and the minutes taken by the clerk in court. And alfo the caption of the indictment was amended by inferting the names of the grand jurors (though this latter was holden not to be neceffary in *R.* v. *Aylett*, *H.* 27 *G.* 3., and was omitted there, and in *Darley*'s cafe, fupra). *Rex* v. *Atkinfon*, *T.* 24 *G.* 3. cited *ib.* 176

4. Alfo the entry-roll in the Treafury, and the record of Nifi Prius, in the fame caufe, were amended, as to the caption of the indictment, by making it agree with the amended caption. *ib.*

5. An amendment allowed in an action for a penalty under the bribery act, by altering the venue from the county at large to an interior jurifdiction, after the time limited for commencing a new action; the particularity of the declaration making it appear probable to the Court that the plaintiff was proceeding on the fame fact for which the action was originally brought when laid by miftake in the wrong county, though there were no affidavit that it was the fame. *Petre* v. *Craft*, *H.* 44 *Geo.* 3. 433

6. Such amendment allowed, though it appeared that there were diftinct caufes of the two different counties, upon an affidavit that the plaintiff proceeded on a miftake in fuppofing that both caufes of action could be proved in the county where the election was holden. *Dover* v *Meftaer*, *H.* 44 *G.* 3. 435

ANNUITY.

. A bond to fecure an annuity fet forth in the memorial recited that the confideration-money, 1400*l.*, was paid on the 24th of *December*, when all the deeds except one were executed and bore date; and the memorial alfo contained a fpecific allegation that the confideration-money was paid, but without ftating any particular time; but, in fact, that one deed not having been executed by one of the grantors, the grantee delivered over the confideration-money on that day to another of the grantors to be by him lodged in a banker's hands in the names of himfelf and the grantee's attorney till that deed was executed; and fuch deed was not in fact executed, nor the money actually available to the grantors till the 26th of the fame month. held that this was a fubftantial compliance with the annuity act, 17 *G.* 3. *c.* 26., the time of payment of the confideration-money not being fpecifically required to be ftated by that act, nor being any otherwife material than as entering into the queftion of the value of the confideration. And held, that upon an iffue taken (in an action of debt on bond) in general terms, without reference to the annuity act, upon a traverfe that the confideration-money was not paid *by the grantee* to the ufe of the grantors, evidence that it was fo paid on the 26th *by the grantee's agent* will fuftain the affirmative of the iffue fo generally framed. *Coare* v. *Giblett*, *T.* 43 *G.* 3. 85

ARREST.

The plaintiff is entitled to recover for goods fold and delivered upon credit for a certain time; it appearing by the fpecial memorandum that the bill was filed on a day fubfequent to the expiration of the credit, though the writ appeared to have iffued before. But if the defendant were actually

actually arrested before the credit expired, semble that he has his remedy in damages. *Swancott* v. *Westgarth*, *T*. 43 *G*. 3. 75

ASSAULT FOR MONEY WON AT PLAY.

If the jury, on an indictment on the stat. 9 *Ann*. c 14, find that the assault was on account of money won at play, the case is within the statute, though the assault were committed at a subsequent time and place, and after abusive language between the parties in respect of such money won *Rex* v. *Hill Darley*, *T*. 43 *G*. 3. 174

ASSUMPSIT.

See Limitations, *Statute of*. Marriage Articles.

1. Assumpsit lies to recover wages by the master of a vessel against his owners which accrued during the detention of the vessel under a hostile embargo in a foreign port, when the crew were made prisoners, but were finally released, together with the vessel, and afterwards completed the voyage; it appearing that freight was received. *Pratt* v. *Cuff*, Sittings at *Guildhall* after *Hilary* term 1798, cor. Lord *Kenyon* C. J. cited in *Thompson* v. *Rowcroft*. 45
2. The plaintiff is entitled to recover for goods sold and delivered upon credit for a certain time; it appearing by the special memorandum that the bill was filed on a day subsequent to the expiration of the credit, though the writ appeared to have issued before. But if the defendant were actually arrested before the credit expired, semble that he has his remedy in damages. *Swancott* v. *Westgarth*, *T*. 43 *G*. 3. 75
3. One who marries a widow having children by her former husband is not bound to maintain such children, though they were maintained by the widow before her second marriage, when her second husband acquired her former means. Therefore if the second husband maintain such children, it is a good consideration for a promise by them when they come of age to repay the expence of their maintenance respectively. Especially where the second husband was a man of small substance, and the children had a competent provision to receive when they came of age, which was to accumulate for them in the mean time, and he made no application to Chancery for an allowance out of the fund, as he might have done. *Cooper* v. *Martin*, *T*. 43 *G*. 3. 76
4. *A*. having neither money nor credit, offers to *B*. that if he will order with him certain goods to be shipped upon an adventure, *if any profit should arise from them*, B. *should have half for his trouble*. *B* having lent his credit on this contract, and ordered the goods on their joint account, which were furnished accordingly, and afterwards paid for by *B*. alone: held that he was entitled to recover back such payment in assumpsit against *A*. who had not accounted to him for the profits; such contract not constituting a partnership as between themselves, but only an agreement for a compensation for trouble and credit; though *B*. were liable as a partner to third persons, creditors. *Hesketh* v. *Blanchard and another*, *executors of Robertson*, *T*. 43 *G* 3 144
5. Where goods were sold upon a contract that the vendee was to pay for them *in three months by a bill of two months*: held that the contract was for a credit of *five* months, and therefore that assumpsit for goods sold and delivered could not be brought at the end of three months upon the neglect of the vendee to give his bill at two months; the remedy being by a special action on the case for damages for the breach of contract in

not giving such bill. *Mussen* v. *Price and another*, *T.* 43 *G.* 3. 147

S. P. in *Miller* v. *Shawe*, *Lancaster Lent* assizes 1801, cor. *Chambre* J. But after the time of credit expired indebitatus assumpsit lies. *ib.*

6. In an action against a tenant upon promises that he would occupy the farm *in a good and husbandlike manner according to the custom of the country*; an allegation, that he had treated the estate contrary to *good husbandry and the custom of the country*, is proved by shewing that he had treated it contrary to the *prevalent course of good husbandry in that neighbourhood*; as by tilling *half* his farm at once, when no other farmer tilled more than a *third*; though many tilled only a *fourth*. And it is not necessary to shew any precise definite custom or usage in respect to the quantity tilled. *Legh* v. *Hewett*, *T.* 43 *G.* 3. 154

7. Where the plaintiff declared that *A.*, since deceased, was indebted to him so much, and that after his death, in consideration of the premises, and that he, at the instance of the defendant, would *forbear and give day of payment* of the debt (not stating *to whom* he was to *forbear*) the defendant promised, &c.: held on demurrer to be no consideration for the promise; for a promise can only be sustained on a consideration of benefit to the defendant or of detriment to the plaintiff; and unless there were some person whom the plaintiff could have sued for his debt, his forbearance was no detriment to him. *Jones* v. *Ashburnham and Nancy his wife*, *H.* 44 *G.* 3. 455

ATTORNEY.

A contract entered into by a practising attorney to relinquish his business and recommend his clients to two other attornies, for a valuable consideration, and that he would not himself practise in such business within certain limits, and would permit them to make use of his name in their firm for a certain time, but without his interference, &c. was holden to be valid in law. *Bunn*, *Executor of Bunn*, v. *Guy*, *M.* 44 *G.* 3. 190

AWARD.

See Practice, No. 6.

1. An award in writing and under seal need not have a deed stamp, unless *delivered as a deed*: but being only delivered *as an award*, it is sufficient if it have the award stamp of 10*s.* *Brown* v. *Vawser*, *H.* 44 *G.* 3. 584

2. An award which is required to be made in writing, &c. and *ready to be delivered* at such a time, is complete if made in writing and ready to be delivered by the arbitrator within the time, though not actually delivered. *ib.*

BAIL.

1. Time refused to be enlarged for the bail to render their principal, on an affidavit that he could not be removed hither without endangering his life. *Wynn* v. *Petty*, *T.* 43 *G.* 3. 102

2. The time for bail to render their principal will not be enlarged because of the unwarrantable arrest and detention of the principal by a foreign enemy. *Grant* v. *Fagan*, *M.* 44 *G.* 3. 189

BAIL-BOND.

On the defendant's arrest his attorney procured his enlargement by undertaking to give a bail-bond to the sheriff in due time; which he afterwards neglected to do, and the plaintiff recovered against the sheriff for the escape: held that such undertaking being contrary to the statute 23 *H.* 6. *c.* 9. the Court would not proceed summarily against the attorney

ney to make him pay the debt and costs for his breach of faith. *Sedgworth* v. *Spicer*, *H.* 44 *G.* 3. 508

BANKRUPT.

1. A trader, before marriage, agreed by parol to settle all his stock on his intended wife; which stock, it appeared afterwards, amounted then to 450*l.* 3 per cents, but in the marriage-articles it was only stated to be 340*l* stock; and the deed executed after marriage settled the same sum: this mistake (proved and accounted for by the witness who prepared the deed, and by the bankrupt, to have originated from the latter giving the sum of 340*l.* as the *value* of the stock *in money* at the time, and the other setting it down as the amount of the *stock itself*) was admitted and agreed by the bankrupt, after his bankruptcy and absconding, to be rectified by the alteration of the sum as it stood in the articles and the deed from 340*l.* stock to 450*l.* stock; which was accordingly done; and the instrument re-executed, with the consent of the bankrupt and his wife, and the trustees: and the whole stock having been sold out by the bankrupt *before* his bankruptcy, and the amount paid into the hands of the trustees before such alteration, who, after the bankruptcy, purchased other stock with the money: held that, however such an alteration might avoid the instruments if done with the consent of the parties interested; yet, inasmuch as one of the parties, the feme covert, (to whom no fraud was imputed), was incapable, by such consent, of exonerating the trustees from the performance of the trust; but equity would probably set up again the destroyed instruments in her favour; the trustees, who had received such money under the instruments when they existed in a valid form, held the same subject to the purpose of the trust, and not for the benefit of the bankrupt's estate; and that the assignees could not recover in assumpsit from the trustees the value of the stock originally included in the marriage-articles and deed, but only the surplus; and such surplus they were entitled to recover at law; the agreement for the settlement of the whole stock not being *evidenced by writing before marriage* within the statute of frauds; but being the subject of equitable jurisdiction only, under the circumstances. *Shaw and another, Assignees of Hill, a Bankrupt*, v. *Jakeman*, *M.* 44 *G.* 3. 201

2. A deed, whereby a bankrupt conveys *all* his property in trust to divide amongst his creditors, is an act of bankruptcy; though the creditors with whom such deed was in the first instance concerted, afterwards, and when it was executed, changed their purpose unknown to the bankrupt, and intended to set it up as an act of bankruptcy. And such deed is operative though it contain a proviso to be void if the trustees think fit. And a commission of bankrupt being afterwards sued out thereon upon the petition of a creditor who had not concurred in such fraudulent deed, and who, together with others who had so concurred, was chosen an assignee: held that it was no objection to an action brought by them as assignees for the recovery of part of the bankrupt's estate, that some of them had concurred in such fraudulent deed set up as the act of bankruptcy; for such estoppel applies not to assignees who are mere trustees for the creditors at large, but only to a petitioning creditor who originates the commission. *Tappenden and others, Assignees of Blinkhorn and Musgrave, Bankrupts*, v. *Burgess*, *M.* 44 *G.* 3. 230

3. School-

3. School-money for the education, &c. of the defendant's son, payable half-yearly, is not a *debt due* till the end of the half-year, so as to be proveable under a commission of bankrupt against the parent, who became bankrupt a few days before the end of the half-year; though he had, just before his bankruptcy, taken his son home *for the holidays*; the contract not being thereby put an end to: and consequently the bankrupt's certificate under the st. 5 *G.* 2. *c.* 30 is no bar to an action against him for the half-year's education, &c. *Parslow* v.* *Dearlove, H.* 44 *G.* 3. 438

4. The stat. 7 *G.* 1. *c.* 31. *s.* 1., which enables debts payable at a future day to be proved under the commission, is confined to *written* securities. *ib*

BARON AND FEME.

After interlocutory judgment against a feme upon a contract, she marries: yet the plaintiff may proceed to judgment and execution against her, without joining the husband by scire facias: and a capias ad satisfaciendum against her following the judgment is, at all events, regular, though the plaintiff had notice of the marriage before. *Cooper* v. *Rachael Hunchin, H.* 44 *G.* 3. 521

BILLS OF EXCHANGE, &c.

1. The acceptor of a bill, dated 4th of *July*, and due 7th of *September*, taking a premium of 6*d.* in the pound from the indorsee and holder for payment of the bill on the 20th of *August* before it was due, is not guilty of usury; there being no loan or forbearance. *Barclay qui tam* v. *Walmsley, T.* 43 *G.* 3. 55

2. *A.*, in consideration of having commissioned *B.* to receive certain *African* bills payable to him, drew a bill upon *B.* for the amount, payable to his own order; *B.* acknowledged by letter the receipt of the list of the *African* bills, and that *A.* had drawn for the amount, and assured him that it would meet with due honour from him. This is an acceptance of the bill by *B.*: and the purport of such letter having been communicated by *A* to third persons, who, on the credit of it, advanced money on the bill to *A.*, who indorsed it to them; held that *B.* was liable as acceptor in an action by such indorsees, although after the indorsement, in consequence of the *African* bills having been attached in *B.*'s hands, who was ignorant of his letter having been shewn, *A* wrote to *B*, advising him not to accept the bill when tendered to him; which, as between *A.* and *B.*, would have been a discharge of *B.*'s acceptance if the bill had still remained in *A.*'s hands. *Clarke and others* v. *Cock, T.* 43 *G.* 3. 57

BILLS OF LADING.

1. The consignor of goods abroad, upon receipt of orders from a correspondent here, shipped goods on account and at the risk of the consignee, and took bills of lading from the captain, making the goods deliverable to the consignor's own order, and transmitted one of such bills *unindorsed* with the invoice to the consignee, inclosed in a letter, informing him that he had drawn upon him for the amount, which he doubted not would meet due honour and close the account; and the consignor, by way of precaution, also sent another bill of lading *indorsed* to his own agent. Held that upon the shipment on account and at the risk of the consignee the property of the goods vested in him, subject only to be devested by the consignor's stopping them while in transitu; and that upon the arrival of the goods, the consignee having obtained possession of

of them from the captain by the production of his *unindorsed* bill of lading, the property became absolute in the consignee, however wrongfully parted with by the captain without a competent authority from the shipper, and however answerable the captain might be to the shipper on that account. *Coxe and others* v *Harden and others, M.* 44 *G.* 3. 211

2 Quære whether the mere indorsement of a bill of lading to an agent to enable him to receive the goods on account of the principal, without any consideration, will enable such agent to maintain trover in his own name for the goods? Semble not. *ib.*

BOND COVENOUS.

See EVIDENCE, No. 1. FRAUDULENT JUDGMENT.

BRIBERY.

1. In an action on the stat. 2 *G* 2. *c* 24. for bribery at an election for members to serve in parliament, it is no objection to the competency of a witness for the plaintiff to prove such bribery, that a similar action was pending against the witness himself for bribery at the same election, and that he claimed to be the first discoverer of the bribery of the defendant, and meant to avail himself of it, if necessary, in case of the defendant's conviction. *Heward* v. *Shipley, T.* 43 *G* 3. 180

2 Where the evidence given by such a witness of the defendant's bribery was by means of the defendant's *confession* of it to the witness; held that the truth of the fact so confessed, as well as of the confession of such fact, was material for the consideration of the jury. *ib*

CARRIER.

Where a carrier gives notice to his customers that he will not be accountable for any parcel, &c *of more than* 5l. *value, unless entered as such and paid for accordingly*; if a parcel be sent *above* that value, without being entered and paid for *as such*, and it be lost, the owner is not entitled to recover any thing. *Izett* v. *Mountain, M.* 44 *G.* 3. 371

CERTIORARI.

See COSTS, No. 1.

CHARTER.

1. The surrender of a charter is void for want of enrolment. *Rex* v. *Osbourne, M* 44 *G.* 3. 327
2. Where a charter granted to the mayor and commonalty that "any alderman being wanted, the rest of the *aldermen might nominate* two *burgesses*, for the choosing of one of them as alderman by the *commonalty* (per commun ta'em): held that *commonalty* included the whole corporation, and that an alderman, so elected by the votes of the other aldermen, as well as the burgesses at large, was properly elected. *ib.*
3. It seems that cotemporaneous and continued usage may be resorted to in aid of the construction of doubtful words in an old charter. *ib.*

COALS.

The offence of selling coals of a different description from those contracted for, upon the stat. 3 *G.* 2. *c.* 26. *f* 4 is complete in the county where the coals are *delivered*, and not where they were *contracted* for, the contract not being for any specific parcel of coals, but for a certain quantity of a certain description. But *the not justly measuring* such coals is a local omission of a local act, required by the 13th section of the act to be performed at the place where the coals are kept for sale, at which

 place

place the bushel of Queen *Anne* is required to be kept and used for the purpose of measuring the coals into sacks of a certain description, in which they are to be carried to the buyer; and therefore the offence is local, and must be laid in the county where the coals were put into the sacks without having been so *justly measured*. *Butterfield qui tam* v. *Windle and another, M.* 44 *G.* 3. 385

CONDITION.

See Copyhold, No. 1. or Landlord and Tenant, No. 3.

CONDITION PRECEDENT, &c.

See Pleading, No. 7.

CONFIRMATION.

See Tenure.

CONSIGNOR AND CONSIGNEE.

The consignor of goods abroad, upon receipt of orders from a correspondent here, ships goods on account and at the risk of the consignee, and takes bills of lading from the captain making the goods deliverable to the consignor's own order, and transmits one of such bills *unindorsed*, with the invoice, to the consignee, inclosed in a letter informing him that he had drawn upon him for the amount; which he doubted not would meet due honour and close the account; and the consignor, by way of precaution, also sent another bill of lading, *indorsed*, to his own agent. Held that upon the shipment, on account and at the risk of the consignee, the property in the goods vested in him, subject only to be devested by the consignor's stopping them while in transitu; and that upon the arrival of the goods, the consignee having obtained possession of them from the captain by the production of his *unindorsed* bill of lading, the property became absolute in the consignee, however wrongfully parted with by the captain without a competent authority from the shipper; and however answerable the captain might be to the shipper on that account. *Coxe and others* v. *Harden and others, M.* 44 *G.* 3. 211

CONSPIRACY.

1. An information at common law for a conspiracy between the captain and purser of a man of war for planning and fabricating false vouchers to cheat the Crown, (which planning and fabrication were done upon the high seas,) is well triable in *Middlesex*, upon proof *there* of the receipt by the Commissioners of the Navy of the false vouchers transmitted thither by one of the conspirators through the medium of the post, and the application *there* by a third person, a holder of one of such vouchers (a bill of exchange) for payment, which he *there* received. *Rex* v. *Brisac and Scott, T.* 43 *G.* 3. 164
2. So where an indictment for a conspiracy was laid in *Middlesex*, where acts done by some of the conspirators were proved, acts done by others of the conspirators in other counties were given in evidence against them. *Rex* v *Bowes and others*, in 1787, cited *ib.* 171

CONTRACT.

See Agreement.

CONVICTION.

One, not a general trader in silver plate, who sells a piece of plate in a particular instance for a price above the value of old silver, is not therefore *a vender of plate* within the stat. 31 *G.* 2. *c.* 32. *s.* 6., which enacts that all persons using the trade of selling plate, &c. shall be *deemed traders*

traders in. sellers or venders of, plate, &c. and shall take out a licence. *The King* v. *Buckle, M.* 44 *G.* 3. 346

COPYHOLD.

See TENURE.

A copyholder demised for one year, and from thence from year to year for the term of 13 years more, *if the lord would license, and so as the same should not be liable to forfeiture*: held that the licence of the lord, &c. was a condition precedent to the lease of the further term of 13 years; and the lord having given notice that he would not give such licence, the assignee of the lessor, to whom the premises were surrendered, was holden entitled to recover in ejectment against the tenant after six months' notice to quit: although it appeared that such surrenderee was a trustee for the lord, (the real purchaser,) who had notice of the terms of the demise when he purchased, with an *exception* in the contract of purchase of *all subsisting leases*, and afterwards accepted of quit-rent from the tenant; the consideration of these latter circumstances belonging to a court of equity. *Doe d. Nunn* v. *Lufkin and others, M.* 44 *G.* 3. 224

CORPORATION.

1. Where the election of mayor was to be made by the majority of an assembly composed of several integral definite parts of a corporation and other burgesses and inhabitants *for the time being*: held that one of such definite integral parts, being reduced below a majority of its proper number, could no longer be represented in such corporate assembly, and the whole corporation was thereby dissolved, being no longer capable of continuing itself. *Rex* v. *Morris*, *Rex* v. *Steward, T.* 43 *G.* 3. 17

2. A charter constitutes a corporation to consist of two bailiffs (senior and junior), twelve aldermen, and an indefinite number of burgesses; and after nominating the two first bailiffs, and directing the election of the first twelve aldermen, provides that on a certain day in the year, the *senior* bailiff shall be chosen by the bailiffs and aldermen, or the major part of them, *out of the aldermen*, for one year, and *until* another of the aldermen to that office in due manner should be *elected, perfected, and sworn*; and also provides for the election of the *junior* bailiff on the same day, *by a different mode of election* for one year, and *until*, &c. (as before): held that the *two bailiffs* do not thereby constitute but *one officer*; and that the senior and junior bailiffs of different years last legally appointed, (their respective successors de facto for several years having been ousted by quo warrantos) might coalesce together, and preside at a corporate meeting of the bailiffs and aldermen for the election of a senior bailiff. And that the charter having directed the future election of a *senior* bailiff (after the first appointment of *two* bailiffs and *twelve* aldermen) to be made *of one of the aldermen*, must be taken to mean that there should be only *eleven* acting efficient aldermen apart from the senior bailiff, who was also an alderman; and consequently that *six* aldermen were a majority of that integral part capable of making, together with the two last legal bailiffs, an elective assembly for the purpose of choosing a senior bailiff. *Rex* v. *Thornton, M.* 44 *G.* 3. 294

3.—1. The surrender of a charter is void for want of enrolment. 2. Where a charter granted to the mayor and commonalty that "any alderman being wanted, the rest of the *aldermen might nominate* two *burgesses*, for the choosing of one of them as alderman by the *commonalty* (per communitatem): held that *commonalty* included

 the

the whole corporation, and that an alderman so elected by the votes of the other aldermen, as well as the burgesses at large, was properly elected. 3. It seems that cotemporaneous and continued usage may be resorted to in aid of the construction of doubtful words in an old charter. 4 Where an information in nature of quo warranto was moved for on the ground of a disputed mode of election, which alone was in controversy at the time of the defendant's election, and which ground was afterwards answered on shewing cause, the Court would not, in their discretion, make the rule absolute to try another incidental and secondary question, as to whether there were a sufficient interval of time allowed between the nomination and election of the defendant; no person's right having been set aside by means of such acceleration of the election, if it were accelerated. *Rex* v. *Osbourne*, *M.* 44 *G.* 3. 327

5. A swearing in, though defective in law, yet being such whereby the party claimed at the time to be a free burgess of a corporation; held a sufficient user of the office to warrant an information in nature of quo warranto, and not like a mere claim of the office. *Rex* v. *Tate*, *M.* 44 *G.* 3. 337

COSTS.

1. The 12th sect. of the stat. 38 *G.* 3. c 52. providing that no indictment shall be removed into the next adjoining county, *except the person applying for such removal* shall enter into a recognizance in 40*l.* for the extra costs, &c. does not relate to indictments sent by *B R.* to be tried in the next adjoining county after a removal thither by certiorari. *Rex* v. *Nottingham*, *M.* 44 *G.* 3. 208

2. In slander, though the defendant justify, and it be found against him, yet if the damages be under 40*s.* the plaintiff cannot recover more costs than damages. *Halford* v. *Smith*, *H.* 44 *G.* 3. 567

3. Proceedings in ejectment stayed until the costs of a former ejectment, and also of an action for mesne profits, were paid. *Doe d. Pinchard* v. *Rose*, *H.* 44 *G.* 3. 585

COVENANT.

See PLEADING, No. 7.

COVENOUS JUDGMENT OR BOND.

See FRAUDULENT JUDGMENT.

CREDIT.

1. The plaintiff is entitled to recover for goods sold and delivered upon credit for a certain time; it appearing by the special memorandum that the bill was filed on a day subsequent to the expiration of the credit, though the writ appeared to have issued before But if the defendant were actually arrested before the credit expired, semble that he has his remedy in damages. *Swancott* v. *Westgarth*, *T.* 43 *G.* 3. 75

2. Where goods were sold upon a contract that the vendee was to pay for them *in three months by a bill of two months:* held that the contract was for a credit of *five* months; and therefore that assumpsit for goods sold and delivered could not be brought at the end of three months upon the neglect of the vendee to give his bill at two months; the remedy being by a special action on the case for damages for the breach of contract in not giving such bill. *Mussen* v. *Price and another*, *T.* 43 *G.* 3. 147

S. P. in *Miller* v. *Shawe*, *Lancaster Lent* assizes 1801, cor *Chambre* J. But after the expiration of the time

time of credit, indebitatus assumpsit lies. 147

CREDITORS.

See AGREEMENT, No. 3.

CUSTOM OF THE COUNTRY.

See LANDLORD AND TENANT, No. 2.

CUSTOMARY ESTATE.

See TENURE.

DEBTOR AND CREDITOR.

See FRAUDULENT JUDGMENT.

DEED.

See EVIDENCE, No. 1.

1. A trader, before marriage, agrees by parol to settle all his stock on his intended wife; which stock, it appeared afterwards, amounted then to 450*l*. 3 per cents.; but in the marriage-articles it was only stated to be 340*l*. stock; and the deed, executed after marriage, settled the same sum: this mistake, (proved and accounted for by the witness who prepared the deed, and by the bankrupt, to have originated from the latter giving the sum of 340*l*. as the *value* of the stock *in money* at that time, and the other setting it down as the amount of the *stock itself*) was admitted and agreed by the bankrupt, after his bankruptcy and absconding, to be rectified by the alteration of the sum as it stood in the articles and the deed from 340*l*. stock to 450*l*. stock; which was accordingly done, and the instrument re-executed, with the consent of the bankrupt and his wife, and the trustees: and the whole stock having been sold out by the bankrupt *before* his bankruptcy, and the amount paid into the hands of the trustees before such alteration, who, after the bankruptcy, purchased other stock with the money: held that, however such an alteration might avoid the instruments, if done with the consent of the parties interested; yet, inasmuch as one of the parties, the feme covert, (to whom no fraud was imputed), was incapable, by such consent, of exonerating the trustees from the performance of the trust; but equity would probably set up again the destroyed instruments in her favour; the trustees, who had received such money under the instruments when they existed in a valid form, held the same subject to the purpose of the trust, and not for the benefit of the bankrupt's estate: and that the assignees could not recover in assumpsit from the trustees the value of the stock originally included in the marriage-articles and deed, but only the surplus: and such surplus they were entitled to recover at law; the agreement for the settlement of the whole stock not being *evidenced by writing before marriage* within the statute of frauds; but being the subject of equitable jurisdiction only, under the circumstances. *Shaw and another, Assignees of Hill a Bankrupt*, v. *Jakeman, M.* 44 *G.* 3. 201

2. One may declare in covenant that the deed was *indented, made, and concluded* on a day subsequent to the day on which the deed itself is stated on the *face of it to have been indented, made, and concluded. Hall* v. *Cazenove, H.* 44 *G.* 3. 477

3. Where a charterparty, dated 6th *February*, but averred not to be executed till the 15th of *March*, contained a covenant by the owner that the ship *should and would* proceed from *D.*, where she *then* lay, *on or before the* 12*th* February, on her outward-bound voyage, and return, &c. and a covenant by the freighter that *in consideration of every thing above mentioned*, &c. he would pay certain freight for the voyage; the voyage

voyage being averred to be performed, and the freight earned, the owner may recover in an action of covenant, without averring that the ship sailed *on or before the 12th of* February, such covenant that the ship should sail *on or before the 12th of* February being either no condition precedent, but only an independent covenant, for breach of which the party had his remedy in damages; or not of the substance of the contract, which was for the performing of the voyage for which the ship was chartered, and earning the freight; or being rendered impossible to be performed by the parties themselves not having executed the deed till after the time appointed for doing the act, and thereby dispensing with the performance of it. *ib.* 477

4. An award in writing and under seal need not have a deed stamp unless *delivered as a deed*; but being only delivered *as an award* it is sufficient if it have the award stamp of 10*s*. *Brown* v. *Vawser*, *H.* 44 *G.* 3. 584

DEVISE.

See Infant Devisee.

1. Under a devise to *A.*, and to the *issue* of his body, *his, her, or their heirs, equally to be divided* if more than one; and if *A.* have no issue of his body living at his decease, then over: held that *A.* took at least an estate for life, with a contingent remainder in fee to his issue, if any; in which case the remainder over was also contingent, being a contingency with a double aspect; and that whether *A.* took for life, with such contingent remainders, or whether he took an estate tail, the remainders over were equally destroyed by his having suffered a recovery before he had any issue born. *Doe d. Gilman, widow,* v. *Elvey*, *M.* 44 *G.* 3. 313

2. A devise of "all the rest I have in the world, both houses, lands, goods and chattels, &c. to my wife, my executrix; *so that* she shall sell my stock in trade and household goods, and *if* these will not pay the debts, she shall sell next the house of fee in *Penzance*, &c.; *so that* my executrix shall pay in good time all lawful debts," &c.: held to carry the fee of the house in *P.* to the executrix; she being charged personally with the payment of debts, in respect of the real as well as personal estate devised. And the postponement of the sale of the realty till after the personal estate was exhausted being merely recommendatory to her. *Goodtitle d. Paddy, widow, and others,* v. *Maddern*, *H.* 44 *G.* 3. 496

3. The distinction turns, in respect to carrying the fee, on this, Whether the debts, &c. are merely a charge on the estate devised, or a charge on the devisee himself in respect of such estate in his hands. *ib.*

DISTRINGAS.

See Practice, No. 3.

ELECTION.

See Corporation.

EMBARGO.

1. A foreign Prince, under pretence of precaution against a supposed act of aggression of our Government, made a hostile seizure of *British* ships in his ports, and imprisoned our seamen on shore; and after six months they were released, and resumed and concluded their voyage, and the owners received their freight: held that such seizure, however hostile in the manner, so far partook of the nature of an *embargo* in its result, and not of a capture, that it did not put an end to the contract of a mariner for wages even during the time of

of ſuch detention and impriſonment. But even conſidering it as a temporary capture, yet, like the caſe of a capture and recapture, the mariner was ſtill entitled to his wages; for a mariner's title to wages depends on the ſhip's earning her freight on the voyage, and the performance of his ſtipulated duty; and here freight for the voyage was ultimately earned: and the mariner was guilty of no breach of duty; for his ſtipulation *not to be on ſhore under any pretence, without leave, before the voyage was ended,* muſt be underſtood of a being on ſhore *by the party's own unauthorized act.* And even if ſuch impriſonment on ſhore could be ſo conſidered, yet the maſter's having afterwards received him again on board without objection amounted to a diſpenſation of the ſervice in the interval, and entitled him to wages according to his original contract. *Beale* v. *Thompſon*, *H.* 44 *G.* 3. 546

S. P. in *Johnſon* v. *Broderick*, *H* 44 *G.* 3. 560

ESTOPPEL.

See Bankrupt, No. 2.

EVIDENCE.

See Conspiracy. Frauds, Statute of, No. 2. Title, No. 1

1. The anſwer of the obligor of a bond to a bill filed for a diſcovery, in which he admitted the bond to have been executed by him, is only ſecondary evidence, and cannot be received as evidence per ſe of the execution, without ſhewing that due diligence had been uſed to diſcover who the ſubſcribing witneſs was, who was alleged to be unknown. *Call, Bart.* v. *Dunning*, *T.* 43 *G.* 3. 53
2. Upon an iſſue taken (in an action of debt on bond to ſecure an annuity) in general terms, without reference to the annuity act, upon a traverſe that the conſideration-money was not paid *by the grantee* to the uſe of the grantors; evidence that it was ſo paid *by the grantee's agent* will ſuſtain the affirmative of the iſſue. *Coare* v. *Giblett*, *T.* 43 *G.* 3. 85
3. In an action on a policy, the property of the ſhip may be proved by parol evidence of the poſſeſſion of the aſſured, unleſs diſproved by the production of the written documents of the ſhip under the regiſter acts. And held that ſuch parol evidence of ownerſhip, ariſing from poſſeſſion at a particular period, was not diſproved by ſhewing a prior regiſter in the name of another, and a ſubſequent regiſter to the ſame perſon. *Robertſon and Thompſon* v. *French*, *T.* 43 *G* 3. 130
4. Cotemporaneous and continuing uſage may be reſorted to, in aid of the conſtruction of doubtful words in an old charter. *Rex* v. *Oſbourne*, *M.* 44 *G.* 3. 327
5. Where plaintiff declared on bond *with a profert*, on non eſt factum pleaded, ſecondary evidence of the bond by means of a copy, and ſhewing that the defendant had taken away the original, and before action brought ſaid that he had burnt it, is not ſufficient to ſuſtain the declaration. *Smith* v. *Woodward*, *Hil.* 44 *G.* 3. 585

EXCEPTION.

See Copyhold, No. 1.

EXECUTION.

1. Money, the ſurplus of a former execution againſt the defendant's goods, was refuſed to be ſtayed in the late ſheriff's hands for the purpoſe of ſatiſfying another execution at the ſuit of the ſame plaintiff againſt the ſame defendant, who had no other effects on which the ſheriff

in

in office could levy. *Fieldhouse* v. *Croft*, *H.* 44 *G.* 3. 510

2. After interlocutory judgment against a feme upon a contract, she marries; yet the plaintiff may proceed to judgment and execution against her, without joining the husband by scire facias. And a capias ad satisfaciendum against her, following the judgment, is at all events regular, though the plaintiff had notice of the marriage before. *Cooper* v. *Rachel Hunchin*, *H.* 44 *G.* 3. 521

3. Allowing that the award of a writ of sequestration out of Chancery (which is the process of that Court to compel appearance and the performance of decrees) has the same obligatory effect to bind the goods as a writ of fi. fa. at common law; yet if the party at whose prayer such sequestration is issued take no measure to compel the execution of it in due time, and the sequestrators do not in fact possess themselves of the goods, it is no excuse to a sheriff, to whom, at a distance of 18 months, a writ of fi. fa. is directed against the goods of the party, defendant in the suit in Chancery, for not executing such writ and selling the goods; the plaintiff in the sequestration having at all events lost his priority by such laches. And therefore the sheriff, who had seized under the fi. fa., having on notice of such supposed obstacle returned nulla bona, was holden liable to the plaintiff in an action for a false return. *Payne* v. *Drewe*, *H.* 44 *G.* 3. 523

4. Though a writ of fi. fa. bind the goods as against the defendant, yet the property is not devested out of him till execution executed: and therefore an execution and sale under a subsequent writ delivered to the sheriff will bind the goods: but the plaintiff in the first execution has his remedy against the sheriff if the non-execution did not proceed from his own laches. *ib.*

EXECUTOR DE SON TORT.

A creditor of an intestate, who received goods of the intestate after his death from his widow, in payment of the debt, cannot protect his possession against an action of trover by the lawful administrator, upon the ground of such delivery having been made by one who had, by such intermeddling, made herself executrix de son tort; no fact appearing to give colour to her having acted in that respect in the character of executrix, except the single act of wrong complained of, in which the defendant participated. *Qu.* How far any payment by an executor de son tort to a creditor can be set up as a bar to an action of trover by the lawful executor, &c.; though if it be such as the latter would have been bound to make, it shall be recouped in damages. *Mountford, Administrator of Holland*, v. *Gibson*, *H.* 44 *G.* 3. 441

FORBEARANCE.

See Assumpsit, No. 7.

FOREIGNER.

A foreigner may gain a settlement here by occupying a tenement of 10*l* a year for forty days. *Rex* v. *The Inhabitants of Eastbourne*, *T.* 43 *G.* 3. 103

FORGERY.

See Deed, No. 1.

FRAUD.

A trust-deed is proposed to the creditors at large of an insolvent, whereby they all engage to accept payment of their *whole* debts *by certain instalments*, the first four of which are to be *guaranteed* by collateral security, the two last to remain *upon the single security of the insolvent*: several of the creditors refuse to sign unless the

the plaintiffs do; and plaintiffs stipulate privately with the insolvent, as the condition of their signature, that he shall procure them collateral security *for the two last instalments* as well as the prior ones; conceiving that they had collateral security originally to cover their debt; and upon the faith of such private agreement they sign the general trust-deed, which is then signed by the rest of the creditors: held such private agreement a fraud upon the other creditors, and void; although the effect of it were not to secure the plaintiffs the payment of more money than the other creditors were to receive, but only further security for the same sum. *Leicester and another* v. *Rose*, *M.* 44 *G.* 3. 372

FRAUDULENT JUDGMENT.

After a creditor has distrained for rent the goods of his debtor, who was also under engagement with the creditor's agent for the sale of his goods, for the purpose of discharging the rent, and also certain book debts due to such creditor and his agent, the debtor confessed judgment to the defendant, another creditor, for a large nominal sum, with a defeazance that execution should only issue for such an amount as would cover the debt of the defendant, and all the other creditors, amongst whom a rateable distribution was to be made: held, that such judgment confessed, being in fact made bona fide, and upon good consideration, was not covenous or fraudulent within the stat. 13 *Eliz. c.* 5., although its effect might be to delay or hinder such first-mentioned creditor from recovering the whole amount of his demands. Neither could it be said to delay or hinder at all his recovering the rent due to him, and for which he had distrained; such distress having a legal priority. But it seems that the penalty given by the third clause of the statute attaches as well upon a covenous judgment as upon a covenous bond, though the latter alone be named in that part of the clause. *Meux and others qui tam* v. *Howell and Atlee*, *T.* 43 *G.* 3. 1

FRAUDS, STATUTE OF.

1. A trader, before marriage, agrees by parol to settle *all* his stock on his intended wife; which stock, it appeared afterwards, amounted then to 450*l.* three per cents, but in the marriage-articles it was only stated to be 340*l.* stock; and the deed executed after marriage settled the same sum: this mistake (proved and accounted for by the witness who prepared the deed, and by the bankrupt, to have originated from the latter giving the sum of 340*l.* as the *value* of the stock *in money* at that time, and the other setting it down as the amount of the *stock itself*) was admitted and agreed by the bankrupt, *after* his bankruptcy and absconding, to be rectified by the alteration of the sum as it stood in the articles and the deed from 340*l.* stock to 450*l.* stock; which was accordingly done, and the instrument re-executed, with the consent of the bankrupt and his wife, and the trustees; and the whole stock having been sold out by the bankrupt *before* his bankruptcy, and the amount paid into the hands of the trustees before such alteration, who after the bankruptcy, purchased other stock with the money: held that, however such an alteration might avoid the instruments if done with the consent of the parties interested; yet, inasmuch as one of the parties, the feme covert (to whom no fraud was imputed), was incapable, by such consent, of exonerating the trustees from the performance of the trust; but equity would probably set up again the destroyed

ſtroyed inſtruments in her favour; the truſtees, who had received ſuch money under the inſtruments when they exiſted in a valid form, held the ſame ſubject to the purpoſe of the truſt, and not for the benefit of the bankrupt's eſtate; and that the aſſignees could not recover in aſſumpſit from the truſtees the value of the ſtock originally included in the marriage-articles and deed, but only the ſurplus: and ſuch ſurplus they were entitled to recover at law; the agreement for the ſettlement of the whole ſtock not being evidenced by writing before marriage within the ſtatute of frauds; but being the ſubject of equitable juriſdiction only, under the circumſtances. *Shaw and another, Aſſignees of Hill, a Bankrupt,* v. *Jakeman, M.* 44 *G.* 3. 201

2. Where one was alleged to have bought an eſtate for another, which he had articled for in his own name, but there was no written agreement between them, nor any part of the purchaſe money paid by the plaintiff, parol evidence that the eſtate was purchaſed for the plaintiff was refuſed, and equity refuſed to compel a conveyance. *Bartlett* v. *Pickerſgill, T.* 32 & 33 *G.* 2. *in Chancery,* cited in *R.* v. *Boſton.* 57

FREIGHT.

See DEED, No. 3.

A ſhip owner having firſt inſured his *ſhip* with *A.* &c. and his *freight* with *B.* &c. for a certain voyage, and having notice of an embargo laid on the ſhip in a foreign port, abandons the ſhip and freight to the reſpective underwriters, and receives from them the whole amount of their ſubſcriptions as for a total loſs of both; firſt undertaking, by a memorandum on the *ſhip* policy, to aſſign to the underwriters thereon his intereſt in the ſhip, and to account to them for it; and afterwards undertaking, by a ſimilar memorandum on the *freight* policy, to aſſign to thoſe underwriters all right of recovery, compenſation, &c. The ſhip being afterwards liberated, and earning freight, which was received by the aſſured; held, that however the queſtion of priority as to the title to the freight might have been as between the different ſets of underwriters litigating out of the ſame fund, and however the weight of argument might preponderate more in favour of the underwriters on the ſhip; yet that the aſſured, who had received the freight from the ſhippers of goods, was at all events liable on his expreſs undertaking to pay it over to the underwriters on freight; and that, without deducting the expences of proviſions, wages, &c. which were charges on the owner before the abandonment, and on the underwriters on ſhip afterwards. *Thompſon* v. *Rowcroft, T.* 43 *G.* 3. 34

GAMING.

If the jury, on an indictment on the ſtat. 9 *Ann. c.* 14., find that the aſſault was on account of money won at play, the caſe is within the ſtatute, though the aſſault were committed at a ſubſequent time and place, and after abuſive language between the parties in reſpect of ſuch money won. *Rex* v. *Hill Darley, T.* 43 *G.* 3. 174

GRANT.

See TITLE.

A. being mortgagee in fee of certain lands, and *B.* the mortgagor, entitled to the equity of redemption, by leaſe and releaſe *A.* conveys and *B.* releaſes the lands to *C.* in fee, who by the ſame inſtrument covenants with and grants to *B.* that it ſhall be lawful for *B.*, his heirs and aſſigns, at all times to enter upon the lands

"from all and every port, &c. *on* "*the coast of* Brazil, and *after the* "*17th* September to the *Cape of* "*Good Hope, beginning* the adventure "upon the *goods from the loading* "*thereof aboard the said* ship at all "or every port, &c on the coast of "*Brazil*, and *from the 17th of* Sep "tember 1800; and *upon the ship in* "*the same manner*," and with liberty to sail to, &c. any places backwards or forwards under the *Portuguese* government, &c at a premium of four guineas per cent., to return 3*l*. 10*s*. should the ship have arrived, or the risk have otherwise ceased on or before the 17th of *September*: held, that the policy only attached on the homeward-bound cargo laden on board *at the coast of* Brazil, and did not cover a cargo originally taken in *at the* Cape of Good Hope, and which continued on board after the 17th of *September*, while the ship was on the coast of *Brazil*, and after she left it on her return to the Cape Neither did the policy cover the ship itself, which was insured *in the same manner* as the goods *Robertson and Thomson* v. *French*, *Tr* 43 G 3. 130

3. Policies of insurance are to be construed by the same rules as other instruments, unless where, by the known usage of trade, or the like, certain words have acquired a peculiar sense distinct from their ordinary and popular sense. *ib*

4. In an action on a policy, the property of the ship may be proved by parol evidence of the possession of the assured, unless disproved by the production of the written documents of the ship under the register acts. And held, that such parol evidence of ownership, arising from possession at a particular period, was not disproved by shewing a prior register in the name of another, and a subsequent register to the same person. *ib*.

5.—1 A policy on a foreign ship must be understood as containing an exception of all captures made by the authority of our own government. *Kellner* v. *Le Mesurier*, *M*. 44 G 3. 396

2. A clause in a ship policy at and from *Lisbon* to *Cadiz*, and at and from thence to *Flushing*, at a premium of 20*l*. per cent., to return 8*l*. per cent., if the ship insured sailed with convoy from *Cadiz* for *England*, and 2*l* per cent. more for convoy from *England* to *Flushing*, or 10*l*. per cent. if with convoy for the voyage, *and arrived*, does not entitle the assured to a return of premium of 8*l*. per cent. in consequence of the ship's arrival merely *in England* with convoy from *Cadiz*, being afterwards captured before her arrival *at Flushing*. for *arrived* means *at the ultimate port of destination*. *ib*.

6. *Q*. If no interest be averred, it is sufficient, under the stat 19 G 2. c. 37 *s* 2, to state that the ship was foreign when the policy was underwritten and the loss happened, without stating the ship to be such when the risk commenced. *ib*.

7 An underwriter on *French* property in time of peace is not liable for a loss occasioned by capture by the King's ships during hostilities which commenced against *Great Britain* and *France* subsequent to the policy being effected, and terminated prior to the action brought. *Gamba and another* v. *Le Mesurier*, *M*. 44 G 3. 407

8. An insurance on goods from *London to Bayonne* in *France*, shipped on board a neutral ship on account and at the risk of *Frenchmen*, *before* the declaration of hostilities between *Great Britain* and *France*, but *exported* afterwards, cannot be enforced against the underwriters, even after the restoration of peace, to recover a loss by capture of a co-belligerent (though not stated to be an *ally*) during the war. For every insurance on

on alien property by a *British* subject must be understood with this implied exception, that it shall not extend to cover *any* loss happening *during the existence of hostilities* between the respective countries of the assured and the assurer. *Brandon* v. *Curling*, *M.* 44 *G.* 3. 410

1. As an assured impliedly warrants the ship insured to be seaworthy, whatever forms an ingredient in seaworthiness is not necessary to be disclosed by the assured to the underwriter in the first instance, unless information upon the subject be particularly called for, and then the assured must disclose truly what he knows in the respect required; therefore where the assured of a ship had received a letter from his captain, informing him that he had been obliged to have a survey on the ship at *Trinidad on account of her bad character*; but the survey which accompanied the letter gave the ship a good character: held that the non-disclosure of such letter and survey to the underwriters did not vacate the policy; though it appeared in evidence that such circumstance, if known, would have enhanced the premium of insurance. *Hayward and another* v. *Rodgers*, *H.* 44 *G.* 3 590

JUDGMENT.

See Fraudulent Judgment.

LANDLORD AND TENANT.

See Tenure.

1. *A.* agreed by parol to sell an estate to *B.* on certain terms, provided *B.* would continue *C.* his tenant, *not for one year only, but from year to year*, (*C.* having just before been let into possession under a contract for the purchase of the estate, which he had failed to pay for in time, and had therefore forfeited his deposit;) and *A.* thereupon agreed to take *C.*'s forfeited deposit as part of the purchase-money: *A.* and *B.* afterwards reduced their agreement respecting the purchase into writing, in which no notice was taken of the stipulation concerning *C.*'s tenancy: yet held, that this stipulation, being collateral to the written agreement, was binding upon *B.*; and that the agreement operated as a tenancy for two years certain at least, though no rent was then mentioned, but was to be settled afterwards; and that the tenancy could not be put an end to at the end of the first year by six months' previous notice to quit. *Denn on the demise of Jacklin* v. *Cartwright*, *T.* 43 *G.* 3. 91

2. In an action against a tenant upon promises that he would occupy the farm *in a good and husbandlike manner according to the custom of the country*; an allegation, that he had treated the estate contrary to *good husbandry and the custom of the country*, is proved by shewing that he had treated it contrary to the *prevalent course of good husbandry in that neighbourhood*; as by tilling *half* his farm at once, when no other farmer tilled more than a *third*; though many tilled only a *fourth*. And it is not necessary to shew any precise definite custom or usage in respect to the quantity tilled. *Legh* v. *Hewett*, *T.* 43 *G.* 3. 154

3. A copyholder demised for one year, and from thence from year to year for the term of 13 years more, *if the lord would license*, and *so as the same should not be liable to forfeiture*: held that the licence of the lord, &c. was a condition precedent to the lease of the further term of 13 years; and the lord having given notice that he would not give such licence, the assignee of the lessor, to whom the premises were surrendered, was holden entitled to recover in ejectment against the tenant after six months' notice

notice to quit: although it appeared that such surrenderee was a trustee for the lord, (the real purchaser,) who had notice of the terms of the demise when he purchased, with an *exception* in the contract of purchase of *all subsisting leases*, and afterwards accepted of quit-rent from the tenant; the consideration of these latter circumstances belonging to a court of equity. *Doe d Nunn* v. *Lufkin and others, M.* 44 *G.* 3. 221

LICENCE.

See Title, No. 1.

A. being mortgagee in fee of certain lands, and *B* the mortgagor entitled to the equity of redemption, by lease and release *A.* conveys and *B* releases the lands to *C.* in fee, who by the same instrument covenants with and grants to *B* that it shall be lawful for *B.* his heirs and assigns at all times to enter upon the lands to search and dig for coal, and to take and carry away the same to his and their own use This is only a *licence*, and conveys no interest in the soil, so as to exclude *C.* and those claiming under him from getting coal there nor could it operate as an *exception* or *reservation* out of the grant in respect to *B*, who had not the legal title in him at the time *Chetham* v. *Williamson and others, Hil.* 44 *G* 3. 469

LIMITATIONS, STATUTE OF.

1. An acknowledgment of the debt, though accompanied with a declaration by the defendant that he did not consider himself as owing the plaintiff a farthing, *it being more than six years since he contracted*, is sufficient to take the case out of the statute of limitations. *Bryan* v. *Horseman, H.* 44 *G.* 3. 599

2. So where the defendant in an affidavit for leave to plead the statute stated, that *since the bill of exchange*, (on which the action was brought) *no demand for payment had been made on him*, it was deemed sufficient to be left to the jury as an acknowledgment, *Rucker* v. *Sir S. Hannay, B. R.* 71. 29 *G.* 3. cited *ib.* 604

MARINER.

See Master and Mariner

MARRIAGE ARTICLES.

A trader, before marriage, agreed by parol to settle all his stock on his intended wife; which stock, it appeared afterwards, amounted then to 450*l.* 3 per cents, but in the marriage articles it was only stated to be 340*l* stock; and the deed executed after marriage settled the same sum: this mistake (proved and accounted for by the witness who prepared the deed, and by the bankrupt, to have originated from the latter giving the sum of 340*l.* as the *value* of the stock *in money* at that time, and the other setting it down as the amount of the *stock itself*) was admitted and agreed by the bankrupt, *after* his bankruptcy and absconding, to be rectified by the alteration of the sum as it stood in the articles and the deed from 340*l* stock to 450*l* stock; which was accordingly done; and the instrument re executed, with the consent of the bankrupt and his wife, and the trustees and the whole stock having been sold out by the bankrupt *before* his bankruptcy, and the amount paid into the hands of the trustees before such alteration, who, after the bankruptcy, purchased other stock with the money: held that, however such an alteration might avoid the instruments if done with the consent of the parties interested; yet, inasmuch as one of the parties, the feme covert, (to whom no fraud was imputed), was incapable, by such consent, of exonerating the trustees

trustees from the performance of the trust; but equity would probably set up again the destroyed instruments in her favour; the trustees, who had received such money under the instruments when they existed in a valid form, held the same subject to the purpose of the trust, and not for the benefit of the bankrupt's estate; and that the assignees could not recover in assumpsit from the trustees the value of the stock originally included in the marriage-articles and deed, but only the surplus; and such surplus they were entitled to recover at law; the agreement for the settlement of the whole stock not being *evidenced by writing before marriage* within the statute of frauds; but being the subject of equitable jurisdiction only, under the circumstances. *Shaw and another, Assignees of Hill, a Bankrupt*, v. *Jakeman*, *M.* 44 *G.* 3. 201

MASTER AND MARINER.

A foreign Prince, under pretence of precaution against a supposed act of aggression of our Government, made a hostile seizure of *British* ships in his ports, and imprisoned our seamen on shore; and after six months they were released, and resumed and concluded their voyage, and the owners received their freight: held that such seizure, however hostile in the manner, so far partook of the nature of an *embargo* in its result, and not of a capture, that it did not put an end to the contract of a mariner for wages even during the time of such detention and imprisonment. But even considering it as a temporary capture, yet, like the case of a capture and recapture, the mariner was still entitled to his wages; for a mariner's title to wages depends on the ship's earning her freight on the voyage, and the performance of his stipulated duty; and here freight for the voyage was ultimately earned: and the mariner was guilty of no breach of duty; for his stipulation *not to be on shore under any pretence, without leave, before the voyage was ended*, must be understood of a being on shore *by the party's own unauthorized act*. And even if such imprisonment on shore could be so considered, yet the master's having afterwards received him again on board without objection amounted to a dispensation of the service in the interval, and entitled him to wages according to his original contract. *Beale* v. *Thompson*, *H.* 44 *G.* 3. 546 S. P. in *Johnson* v. *Broderick*, *H.* 44 *G.* 3. 566

MONEY.

Money, the surplus of a former execution against the defendant's goods, was refused to be stayed in the late sheriff's hands for the purpose of satisfying another execution at the suit of the same plaintiff against the same defendant, who had no other effects on which the sheriff in office could levy. *Fieldhouse* v. *Croft*, *H.* 44 *G.* 3. 510

NOTICE TO QUIT.

See LANDLORD AND TENANT, No. 1.

NAVY.

See PRIZE.

OFFICER.

See CORPORATION, No. 4.

OFFICIAL ACTS.

How far binding on the title of parties, or only directory, vide tit. *Ship Register Acts*.

PARENTS AND CHILDREN.

One who marries a widow having children by her former husband is not

not bound to maintain such children, though they were maintained by the widow before her second marriage, when her second husband acquired her former means. Therefore if the second husband maintain such children, it is a good consideration for a promise by them when they come of age to repay the expence of their maintenance respectively. Especially where the second husband was a man of small substance, and the children had a competent provision to receive when they came of age, which was to accumulate for them in the mean time, and he made no application to Chancery for an allowance out of the fund, as he might have done. *Cooper* v. *Martin*, *T.* 43 *G.* 3. 76

PAROL DEMURRER.

An infant devisee sued by a special creditor of the devisor cannot pray the parol to demur by reason of his nonage; such privilege of an heir who is in by descent not being extended to a devisee by the stat. 3 *W.* & *M.* *c.* 1., which charges the land in his hands for the specialty debts of the devisor. *Plasket, Executor of Plasket,* v. *Beeby and others, H.* 44 *G.* 3. 485

PARTNERS.

A. having neither money nor credit, offers to *B.* that if he will order with him certain goods to be shipped upon an adventure, *if any profit should arise from them*, B. *should have half for his trouble*. *B.* having lent his credit on this contract, and ordered the goods on their joint account, which were furnished accordingly, and afterwards paid for by *B.* alone: held that he was entitled to recover back such payment in assumpsit against *A.* who had not accounted to him for the profits; such contract not constituting a partnership as between themselves, but only an agreement for a compensation for trouble and credit; though *B.* were liable as a partner to third persons, creditors. *Hesketh* v. *Blanchard and another, executors of Robertson*, *T.* 43 *G.* 3. 144

PAYMENT.

1. A bond to secure an annuity set forth in the memorial recited that the consideration-money, 1400*l.*, was paid on the 24th of *December*, when all the deeds except one were executed and bore date; and the memorial also contained a specific allegation that the consideration-money was paid, but without stating any particular time; but, in fact, that one deed not having been executed by one of the grantors, the grantee delivered over the consideration-money on that day to another of the grantors to be by him lodged in a banker's hands in the names of himself and the grantee's attorney till that deed was executed; and such deed was not in fact executed, nor the money actually available to the grantors till the 26th of the same month: held that this was a substantial compliance with the annuity act, 17 *G.* 3. *c.* 26, the time of payment of the consideration-money not being specifically required to be stated by that act, nor being any otherwise material than as entering into the question of the value of the consideration. And held, that upon an issue taken (in an action of debt on bond) in general terms, without reference to the annuity act, upon a traverse that the consideration-money was not paid *by the grantee* to the use of the grantors, evidence that it was so paid on the 26th *by the grantee's agent* will sustain the affirmative of the issue so generally framed. *Coare* v. *Giblett*, *T.* 43 *G.* 3. 85

2. It seems also to have been a good payment, by relation, on the 24th, as the

the beneficial receipt of it then by the grantors was only suspended on account of their own laches in not having prepared the deeds in time. *ib.* 85

PERFORMANCE.

See Relation.

PERJURY.

1. *A.* having brought an action against *B.*, the latter filed a bill in equity against him for a discovery and injunction, and for an account; to which *A.* having put in his answer, denying the allegations of *B.*, which involved the merits of the suit at law, the injunction was dissolved. on which answer *B.* indicted *A.* for perjury; and the indictment and action coming on to be tried at the same assizes, the indictment standing first; held, that *B.* was a competent witness to prove the perjury, as he could not avail himself of the conviction of *A.* in any civil proceeding between them either in law or equity. *Rex* v. *Boston, Hil.* 44 *G.* 3 572

2. Equity refused leave to file a supplemental bill in nature of a bill of review, in consequence of a conviction of a witness in the original proceeding for perjury, which conviction was obtained on the evidence of the plaintiff in the suit as well as of others. *Bartlett* v. *Pickersgill*, *Tr.* 32 & 33 *G.* 2. in Chancery, cited *ib.*

PLATE.

One, not a general trader in silver plate, who sells a piece of plate in a particular instance for a price above the value of old silver, is not therefore *a vender of plate* within the stat. 31 *G.* 2. *c.* 32. *s.* 6., which enacts that all persons using the trade of selling plate, &c. shall be *deemed traders in, sellers or venders of*, plate, &c. and shall take out a licence. *The King* v. *Buckle*, *M.* 44 *G.* 3. 346

PLEADING.

1. Where one declared in case for obstructing a water-course, upon his *possession* of a mill *with the appurtenances*, and that *by reason of such his possession he had a right to the use of water running in a certain tunnel to the mill*; such allegation is not supported by proof that the tunnel was made on the defendant's land, which he had agreed to let the plaintiff have for this purpose for a certain consideration, but of which *no conveyance* was made by the defendant to the plaintiff; and he had since refused assent: because the plaintiff had not the water *by reason of the possession* of the mill, &c. but by parol licence or contract, which could not pass the title to the land, and as a licence was revocable, and revoked. *Fentiman* v. *Smith*, *T.* 43 *G.* 3. 107

2. Where to debt on bond the plea, after craving oyer, set out the condition of the bond, referring to an agreement consisting of various articles relative to the building of a house by the defendant for the plaintiff, " *conformably* (as the plea set forth) *to the particulars* annexed to the agreement, *amongst which particulars* such and such things were mentioned;" and so setting out divers particulars, with reference to the agreement; and then pleading *performance generally* of all the covenants, &c. in *the above-recited agreement contained*: to which there was a special demurrer, assigning for cause, that performance was pleaded *generally* to the agreement, which appeared to be only *partially set forth*, and that for aught appeared the agreement might contain *negative* or *disjunctive* covenants, to which general performance could not be pleaded: and held such cause of de-

 murrer

murrer to be well-founded; for, from the defendant having set out certain particulars of the agreement, *amongst others*, it was to be intended that some others were not set forth; and there was not even an allegation that the instrument contained *no negative or disjunctive* articles of agreement, even if such a brief method of pleading were admissible. Qd. dub^r. *The Earl of Kelly* v. *Baxter and others*, *M* 44 G. 3. 340

3. So where general performance was pleaded to debt on bond conditioned to perform covenants, and the plaintiff in his replication set out the indenture verbatim and then demurred, shewing for cause that the defendant had not shewn how he had performed the negative covenants: demurrer held good. Aliter if the indenture set out in the replication had contained no *negative* or *disjunctive* covenants, in which case the defect of the plea in not setting out the indenture would have been cured. *Plenty* v. *Raine*, *M.* 17 *G.* 3. cited *ib.* 344

4. Quære if no interest be averred in an action on a policy of insurance, it is sufficient under the stat. 19 *G.* 2. *c.* 37. *f.* 2. to state that the ship was *foreign* when the policy was underwritten and the loss happened, without stating the ship to be such *when the risk commenced*? *Kellner* v. *Le Mesurier*, *M.* 44 *G.* 3. 395

5. Where the plaintiff declared that *A.*, since deceased, was indebted to him so much, and that after his death, in consideration of the premises, and that he, at the instance of the defendant, would *forbear and give day of payment* of the debt (not stating *to whom* he was to *forbear*) the defendant promised, &c.; held on demurrer to be no consideration for the promise; for a promise can only be sustained on a consideration of benefit to the defendant, or of detriment to the plaintiff; and unless there were some person whom the plaintiff could have sued for his debt, his forbearance was no detriment to him. *Jones* v. *Ashburnham and Nancy his wife*, *H.* 44 *G.* 3. 455

6. One may declare in covenant that the deed was *indented, made, and concluded* on a day subsequent to the day on which the deed itself is stated on the *face of it to have been indented, made, and concluded*. *Hall* v. *Cazenove*, *H.* 44 *G.* 3. 477

7. Where a charterparty, dated 6th of *February*, but averred not to be executed till the 15th of *March*, contained a covenant by the owner that the ship *should and would* proceed from *D.*, where she then lay, *on or before the 12th of* February, on her outward-bound voyage, and return, &c. and a covenant by the freighter that *in consideration of every thing above mentioned*, &c. he would pay certain freight for the voyage; the voyage being averred to be performed, and the freight earned, the owner may recover in an action of covenant, without averring that the ship sailed *on or before the 12th of* February, such covenant that the ship should sail *on or before the 12th of* February being either no condition precedent, but only an independent covenant, for breach of which the party had his remedy in damages; or not of the substance of the contract, which was for the performing of the voyage for which the ship was chartered, and earning the freight; or being rendered impossible to be performed by the parties themselves not having executed the deed till after the time appointed for doing the act, and thereby dispensing with the performance of it. *Hall* v. *Cazenove*, *H.* 44 *G* 3. 477

8. No matter of defence arising after action brought can properly be pleaded in bar of the action generally, but it ought to be pleaded in bar of the *further maintenance* of the suit. There-

Therefore where one who was an alien *amy* at the time of the action brought became an alien *enemy* before plea pleaded, and the defendant pleaded that the plaintiff ought not *to have or maintain* his action, because he was before *and at the time of exhibiting his bill*, and that he *now* is an *alien enemy*, &c.; concluding that therefore the plaintiff ought to be barred from *having or maintaining his action*, &c. To which the plaintiff replied, that *at the time of exhibiting his bill* he was an *alien amy*; wherefore he *prayed judgment and his damages*: to which there was a demurrer: held that the plea was ill pleaded. But yet, as the Court were ex officio bound to give such judgment as appeared upon the whole record to be proper, without regard to the issues found or confessed, or to any imperfection in the prayer of judgment on either side; and as it appeared upon the whole that the plaintiff was *now* an alien *enemy*, and therefore incapable of *maintaining further* his suit, judgment was given that he be barred from *further having or maintaining his action*. *Le Bret* v. *Papillon*, *H.* 44 *G.* 3. 502

9. Where plaintiff declared on bond *with a profert*, on non est factum pleaded, secondary evidence of the bond by means of a copy, and shewing that the defendant had taken away the original, and before action brought said he had burnt it, is not sufficient to sustain the declaration. *Smith and others* v. *Woodward*, *Hil.* 44 *G.* 3. 585

10. In bailable process the plaintiff cannot declare against one defendant separately upon joint process, and affidavit to hold to bail against two; though they were sued upon a joint and separate promissory note. *Lewin, Executor, &c.* v. *Smith the Younger*, *H.* 44 *G.* 3. 58[illegible]

POOR-RELIEF.

See Parents and Children, No. 1.

PRACTICE.

See Amendment. Costs. Bail-Bond.

1. The delivery of a declaration against a prisoner, though within two terms, is a nullity if there were no bill filed before; and he is entitled to his discharge under the rule of Court. *W. & M.* *Nowell* v. *Bingham*, *T.* 43 *G.* 3 16

2. Time refused to be enlarged for the bail to render their principal, on an affidavit that he could not be removed hither without endangering his life. *Wynn* v. *Petty*, *T.* 43 *G.* 3. 102

3. After a summons and distringas issued against a privileged defendant in the county where the action is brought, but in which he did not reside, and of which process he had no notice, and returns of non est inventus and nulla bona, a testatum distringas may regularly issue into the county in which he resides and has property, without any new summons in such county; but the sheriff ought not to levy more than 40*s.* under such testatum distringas in the first instance, according to the usual course. *Bloxam Knt. and others* v. *Surtees and others*, *T.* 43 *G.* 3. 162

4. A cognovit containing any matter of *agreement*, as to take the debt by instalments, ought to have an agreement stamp; and if it have not, proceedings may be set aside for irregularity. *Reardon* v. *Swaby*, *T.* 43 *G.* 3. 188

5. The time for bail to render their principal will not be enlarged because of the unwarrantable arrest and detention of the principal by a foreign enemy. *Grant* v. *Fagan*, *M.* 44 *G.* 3. 189

When a verdict is taken by conſent, ſubject to the award of an arbitrator as to the quantum, judgment cannot be ſigned for the amount of the ſum awarded, without firſt obtaining the uſual rule for ſigning judgment; and where judgment was ſo ſigned againſt the principal without ſuch rule, and the plaintiff proceeded to execution againſt the bail, after procuring a return of non eſt inventus to a Ca. Sa. againſt the principal, and a return of two nihils to two writs of ſcire facias aginſt the bail; the Court upon application of the bail, together with the principal, held that they were entitled to be relieved from ſuch judgment againſt the principal, and its conſequences againſt the bail; upon an affidavit by them that they had no notice of ſuch judgment till the writ of Ca. Sa. iſſued againſt the bail, when they applied to vacate the proceedings. But the Court held they could not ſet aſide the writ of Ca. Sa. againſt the bail, on account of ſuch irregularity of the judgment againſt the principal, while ſuch judgment remained in force. *Hayward* v *Ribbans*, *M.* 44 *G.* 3. 310

7. A defendant putting in a plea in abatement in time, with an affidavit in the uſual form, that the promiſes *contained in the declaration* were entered into, if at all, by others as well as himſelf; which affidavit was ſworn at *Liverpool* on the day of filing the declaration in town, and before the defendant could have ſeen it; was holden not to be a nullity, ſo as to entitle the plaintiff to ſign interlocutory judgment as for want of a plea. *Lang* v. *Comber*, *M.* 44 *G.* 3. 348

8. By the rule of Court, *Hil.* 26 *G.* 3., if there be a *trial* againſt a priſoner, he is ſuperſedable, unleſs charged in execution within two terms afterwards; if there be *final judgment* againſt him *without trial*, (which is what is there meant by *final judgment*) then he is ſuperſedable, unleſs charged in execution within two terms after ſuch final judgment; incluſive of the term of trial or final judgment reſpectively. *Heaton* v. *Wittaker*, *M* 44 *G.* 3. 349

9. Where the cauſe of action aroſe partly in *Derbyſhire* and partly in *Ireland*, the Court refuſed to change the venue from *London* to *Derby*, on an affidavit that the cauſe of action aroſe in *D.* and *I.*, and not in *London* or elſewhere than in *D.* and *I.* *Walker* v. *Wright*, *H.* 44 *G.* 3. 495

10. Money, the ſurplus of a former execution againſt the defendant's goods, was refuſed to be ſtayed in the late ſheriff's hands for the purpoſe of ſatisfying another execution at the ſuit of the ſame plaintiff againſt the ſame defendant, who had no other effects on which the ſheriff in office could levy. *Fieldhouſe* v. *Croft*, *H.* 44 *G.* 3. 510

11. After interlocutory judgment againſt a feme upon a contract, ſhe married: yet the plaintiff may proceed to judgment and execution againſt her, without joining the huſband by ſcire facias: and a capias ad ſatisfaciendum againſt her following the judgment is, at all events, regular, though the plaintiff had notice of the marriage before. *Cooper* v. *Rachael Hunchin*, *H* 44 *G.* 3. 521

12. After a judge's order obtained by the defendant for time to plead, and no plea within the time, the plaintiff may ſign judgment as for want of a plea, without a demand of it. *Pearſon* v. *Reynolds*, *H.* 44 *G.* 3. 571
S. P. in *Burkett* v. *Latham*, *M.* 9 *G.* 2. cited *ib.*

13. In bailable proceſs the plaintiff cannot declare againſt one defendant ſeparately upon joint proceſs and affidavit to hold to bail againſt two; though they were ſued upon a joint and ſeparate promiſſory note. *Lewin, Executor, &c.* v. *Smith*, *H.* 44 *G.* 3. 589

14. The

14. The same sheriff, by whom any writ directed to him is executed while in office, ought to make his return to the same, and hand over such writ and return to the new sheriff who comes into office before the return day, and such new sheriff will return the writ with the old sheriff's return thereon. And if the old sheriff, after arresting a defendant, suffer him to escape, and go out of office before the return day, he alone is answerable for the escape. *Rex* v. *The late Sheriff of Middlesex.* 604

15. Yet if the new sheriff by mistake return cepi corpus to a writ directed to the old sheriff, after the latter, who arrested the defendant upon it, had permitted an escape, and an attachment afterwards issue against the old sheriff who was ruled to bring in the body, the irregularity may be waved by not moving in reasonable time to set aside the attachment. *ib*

PRISONER.

By the rule of Court, *Hil.* 26 *G.* 3., if there be a *trial* against a prisoner, he is supersedable, unless charged in execution within two terms afterwards. If there be *final judgment* against him, *without trial*, (which is what is there meant by "*final judgment*), then he is supersedable, unless charged in execution within two terms after such final judgment; inclusive of the term of trial or final judgment respectively. *Heaton* v. *Wittaker*, *M.* 44 *G.* 3. 349

PRIVILEGE.

See Practice, No. 3.

PRIZE.

1. By the 4th article of the king's proclamation of 1797, respecting the distribution of prize, as to flag officers, it is directed, that a chief flag officer *returning home* from a foreign station shall have no share of the prizes taken by the ships *left behind to act under another command*; this applies as well to *another command devolving* by seniority, as to another chief flag officer *appointed* by express commission to succeed the officer *returning home*: and such *returning home*, &c. means the commencement in fact of a commander in chief's departure from the local station of his command for the purpose of returning home, *leaving* his fleet *behind*, i. e. leaving it for all effective purposes under the control of another commander competent, under the terms of the proclamation, to command in his stead. Therefore where a flag officer, commander in chief in the *Mediterranean*, returned to *England* by leave of the Admiralty for the recovery of his health, leaving the fleet under the command of the next flag officer in seniority, but having before his departure dispatched one of the fleet on a cruise, who made captures within the limits of the station, after the departure homewards of such commander in chief out of those limits, but before any new orders given by the next flag officer on whom the command of the station had devolved: held, that the right to the 1-8th, or commanding flag officer's share of prize, belonged to the *present acting* flag officer in command on the station, and not to the chief flag officer *returning home*; although the latter still retained the title, pay, and table money of commander in chief after his return home, and did not resign his commission as such till after the prize taken, and had official correspondence with the Admiralty in that character till his resignation, and made appointments in the fleet as such; the governing principle of his majesty's proclamation being, that the reward of prize [illegible]

attached to the present effective commander on the station, and not to the nominal one who *returns home, leaving* ships *behind to act under another command. Lord Viscount Nelson v. Tucker, M.* 44 *G.* 3. 238

3. An inferior flag officer succeeding by devolution to the principal command, upon the returning home of his superior flag officer commander in chief on a foreign station, is entitled, under the king's proclamation of 1797, to the chief flag officer's 1-8th share of prize taken within the limits of the station by a squadron which had been detached from the main body, (with which such inferior flag officer remained,) by the superior flag officer, before his return home; but the prize not taken till after he had passed the limits of his station on such return home: and this, though the superior flag officer before his departure directed the inferior flag officer to take under his command those ships only, *by name*, which continued with him at the principal station, and the detached squadron *when they returned to the same place* after the particular service performed, for the performance of which he had before limited a time: and though such superior flag officer's commission was stated to be to command in chief a squadron *upon a particular service*, and not merely upon a *particular station*: and though such superior flag officer did not resign his commission of commander in chief till after his return home, and after the prize taken. At least the superior is not entitled to recover such share of prize from the inferior flag officer who had received it. *Lord Keith v. Pringle, M.* 44 *G.* 3. 262

PROCESS.

See Execution. Practice, No. 3.

QUO WARRANTO.

See Corporation.

1. Where an information in nature of quo warranto was moved for on the ground of a disputed mode of election, which alone was in controversy at the time of the defendant's election, and which ground was afterwards answered on shewing cause, the Court would not in their discretion make the rule absolute to try another incidental and secondary question, as to whether there were a sufficient interval of time allowed between the nomination and election of the defendant; no person's right having been set aside by means of such acceleration of the election, if it were accelerated. *Rex* v. *Osbourne, M.* 44 *G.* 3. 327
2. A swearing in, though defective in law, yet being such whereby the party claimed at the time to be a free burgess of a corporation; held a sufficient user of the office to warrant an information in nature of quo warranto against him, and not like a mere claim of the office. *Rex* v. *Tate, M.* 44 *G.* 3. 337

RECOVERY.

Under a devise to *A*, and to the *issue* of his body, *his, her, or their heirs, equally to be divided* if more than one; and if *A.* have no issue of his body living at his decease, then over: held that *A* took at least an estate for life, with a contingent remainder in fee to his issue, if any; in which case the remainder over was also contingent, being a contingency with a double aspect, and that whether *A.* took for life, with such contingent remainders, or whether he took an estate tail, the remainders over were equally destroyed by his having suffered a recovery before he had any issue born. *Doe d. Gilman, widow,* v. *Elvey, M.* 44 *G.* 3. 313

REGISTER ACTS.

See SHIP-REGISTER ACTS.

RELATION.

Vide PAYMENT, No. 1, 2.

An inchoate act which is to be consummate on the performance of a conditional act required to be first done by the party who is the object of such inchoate act, and where the performance rests wholly with such party, becomes, when consummate by the performance on his part of such conditional act, an effectual act for the benefit of the inchoate actor by relation from the time of such his inchoate act done. Therefore if payment of money be to be made by *A.* on the 24th of *December*, on the execution of certain securities by *B.*, and such securities not being prepared on that day, *A.* pay the money into a banker's house in his and *B.*'s joint names, for the benefit of *B.*, when such securities shall be executed, and they are prepared on the 26th, when the money is received by *B.*; this, as to *A.*, is a payment by relation on the 24th. *Coare* v. *Giblett*, *Tr.* 43 G. 3. 95

RELEASE.

See TENURE.

RESPONDENTIA.

In a respondentia bond, the condition, after reciting that the money was lent *upon the goods laden and to be laden* on board a certain ship on her voyage out and home, was, that if the ship should proceed on her voyage and return within 36 months, (the dangers of the seas excepted), and if the borrower within 30 days after her arrival should pay to the lender the sum agreed on, or if in the voyage and within the said 36 months the ship should be lost by fire, enemies, or other casualties, the borrower should, within six months after such loss, pay to the lender a proportionable average on all the goods carried out and acquired during the voyage which should be saved, then the obligation to be void: held, that this was no more than a *personal* obligation from the borrower to the lender, and did not give the latter any *specific pledge or lien* on the home cargo or the proceeds thereof. *Busk* v. *Fearon and others*, *M.* 44 G. 3. 319

SAILOR.

See MASTER and MARINER.

SAVING AND RESERVING.

See TENURE.

SEQUESTRATION.

1. Allowing that the award of a writ of sequestration out of Chancery (which is the process of that Court to compel appearance and the performance of decrees) has the same obligatory effect to bind the goods as a writ of fi. fa. at common law; yet if the party at whose prayer such sequestration is issued take no measure to compel the execution of it in due time, and the sequestrators do not in fact possess themselves of the goods, it is no excuse to a sheriff, to whom, at a distance of 18 months, a writ of fi. fa. is directed against the goods of the party, defendant in the suit in Chancery, for not executing such writ and selling the goods; the plaintiff in the sequestration having at all events lost his priority by such laches. And therefore the sheriff, who had seized under the fi. fa., having on notice of such supposed obstacle returned nulla bona, was holden liable to the plaintiff in an action for a false return. *Payne* v. *Drewe*, *H.* 44 G. 3. 513
2. Though a writ of fi. fa. bind the goods as against the defendant, ye[t]

the property is not devested out of him till execution executed: and therefore an execution and sale under a subsequent writ delivered to the sheriff will bind the goods: but the plaintiff in the first execution has his remedy against the sheriff if the non-execution did not proceed from his own laches. *ib.* 523

SETTLEMENT—*by Hiring and Service.*

1. A servant hired for a year, four months before the end of the year being discharged by her master upon a trivial dispute, applied to a magistrate for redress, being desirous of continuing in the service. The magistrate ordered the master to take her back, or pay the whole year's wages. The master refused to take her back, but paid the whole year's wages, (but not some wool which he also had agreed to give her if she behaved well). The servant took the money, and tendered herself as a servant to others: held, that the contract was thereby dissolved, and no settlement gained under it, as in case of a mere dispensation of service. *Rex* v. *The Inhabitants of King's Pyon, M.* 44 *G.* 3. 351

2. A yearly servant, about a fortnight before his year expired, being too ill to work, his master paid him his *whole* year's wages, when he *left the service*, and went to an hospital, and never returned into his master's service: held a dissolution of the contract; and that no settlement was gained by such hiring and service. *Rex* v. *The Inhabitants of Sudbrooke, M.* 44 *G.* 3. 356

—— *By taking a Tenement.*

[illegible] foreigner may gain a settlement [illegible] occupying a tenement of 10*l.* [illegible] for 40 days. *Rex* v. *The Inhabitants of Eastbourne, T.* 43 *G.* 3. 103

2. The pauper *took* a tenement at 11*l.* a-year which he occupied, still receiving parish pay, for six months after; having previously agreed to underlet to another a part for 5 *l.* a-year, which other *guaranteed* to the landlord the payment of the rent, without which he would not have let to the pauper; but the pauper paid the whole rent for the first year: held, that this was a coming to settle upon a tenement of 10 *l.* a-year within the stat. 13 & 14 *Car.* 2. *c.* 12. by occupying which for 40 days irremoveable the pauper gained a settlement; though the Sessions concluded from the whole of the case that *credit* was given by the landlord to the pauper *for* 6 *l a year only of the rent*, and that for the residue the credit was given to the guarantee; for if the pauper were *legal tenant* of the whole, it was immaterial whether *credit* were given him for the *rent*. *Rex* v. *The Inhabitants of Hooe, M.* 44 *G.* 3. 362

SHERIFF.

See PRACTICE, No. 14.

SHIP REGISTER ACTS.

1. Under the ship register acts (26 *G.* 3. *c.* 60. and 34 *G.* 3 *c.* 68.) a bill of sale transferring the property to a trustee, in trust for the underwriters not named, is at most only void (if at all) as to the objects of the trust, but sufficient to convey the legal title to the trustees. And such bill of sale of a ship at sea is valid, notwithstanding the omission of the officer at the out-port to which the ship belonged to indorse the entry of the transfer on the oath on which the original certificate of registry was obtained, and to make a memorandum thereof in the book of registry, and to give notice of the same to the commissioners in *London*, as required by sect. 16. of the stat. 34 *G.* 3. *c.* 68.; such acts to be

done

done by the public officer being only directory. But the delivery of a copy of the bill of sale of a ship at sea for the purpose of making such entry and memorandum and giving such notice, being an act required to be done by the party himself to whom the transfer is made, for want of which the statute avoids the sale, must be complied with in order to convey the property: and therefore the purchaser under such circumstances, having omitted to do so, cannot make a title to the ship per saltum by getting her registered de novo in another port where he resided at the time: for whatever may amount to a transfer of a ship to another port within the meaning of the statutes, at all events such transfer cannot be made by one who has no interest in the ship. *Heath* v. *Hubbard*, *Tr.* 43 *G.* 3. 110

2. In an action on a policy, the property of the ship may be proved by parol evidence of the possession of the assured, unless disproved by the production of the written documents of the ship under the register acts. And held, that such parol evidence of ownership, arising from possession at a particular period, was not disproved by shewing a prior register in the name of another, and a subsequent register to the same person. *Robertson and Thompson* v. *French*, *T.* 43 *G.* 3. 130

SLANDER.

See Costs, No. 2.

STAMP.

1. A cognovit containing any matter of *agreement*, as to take the debt by instalments, ought to have an agreement stamp; and if it have not, proceedings may be set aside for irregularity. *Reardon* v. *Swaby*, *Tr.* 43 *G.* 3. 188

2. A *warrant* of attorney to confess judgment being liable as a deed to a stamp duty of 10*s*. by various statutes prior to the 37 *G.* 3. *c.* 111., which imposes an additional duty of 10*s*. on all deeds, with an *exception* of bonds and *letters of attorney*, is within such exception, and therefore liable only to a duty of 10*s*. as before that statute. *Barrow* v. *Mashiter*, *M.* 44 *G.* 3. 431

3. An award in writing and under seal need not have a deed stamp, unless *delivered as a deed*; but being only delivered *as an award*, it is sufficient if it have the award stamp of 10*s*. An award which is required to be made in writing, &c. and *ready to be delivered* at such a time, is complete, if made in writing and *ready to be delivered* by the arbitrator within the time, though not actually delivered. *Brown* v. *Vawser*, *H.* 44 *G.* 3. 584

STOCK-JOBBING.

In an action on the stock-jobbing act, 7 *G.* 2. *c.* 8. *s.* 6. to recover damages against one who had refused to accept and pay for stock agreed to be sold to him, it is necessary to prove an actual transfer of the stock to some other person before the action brought: and proof alone of a contract to sell to such other person *before* the action brought, though followed up by an actual transfer *afterwards*, is not sufficient to maintain the action. *Heckscher and others* v. *Gregory*, *H.* 44 *G.* 3. 607

STATUTES.

Henry VI.

23. *c.* 9. (Bail bond). 568

Henry VIII.

32. *c.* 16. (Foreigner. Lease.) 207

Elizabeth.

13. *c.* 5. (Covenous judgment or bond). 5

43. *c.* 2. *s.* 7. (Maintenance of relations.) 79

TENANT IN COMMON.

Semble, that a fale of the whole of a fhip by one who is only a part-owner, in exclufion of the right of another who is tenant in common with him, is not equivalent to the *deftruction* of the fubject-matter mediately or immediately, fo as to enable his co-tenant to maintain trover againft him for it. *Heath* v. *Hubbard*, *T.* 43 G. 3. 110

Vide TROVER, No. 2.

TENURE.

See LANDLORD and TENANT.

Where the lord of a cuftomary manor, by his deed, made fince the ftatute of quia emptores, granted to his cuftomary tenant, who then held by the payment of certain cuftomary rents and other fervices, that in confidertion of a 61 penny fine, (or 61 years rent), he the lord *ratified and confirmed* to the tenant and his heirs *all his cuftomary and tenant right eftates*, with the appurtenances, &c., and granted that the tenant and his heirs fhould be thereof *freed, acquitted, exempted, and difcharged from the payment of all rents, fines, heriots, &c. dues, cuftoms, fervices, and demands*, at any time thereafter happening *to become due* in refpect of the tenancy; *except* one penny yearly rent, and alfo *excepting and referving* fuit of court, with the fervice incident thereto; and *faving and referving* all royalties, efcheats, and forfeitures, and all other advantages and emoluments belonging to the fignory, fo as not to prejudice the *immunities* thereby granted to the tenant; and alfo granted liberty to cut timber, and to fell or leafe, &c. without licence: held that fuch *confirmation* to the tenant of his cuftomary and tenant-right eftate freed, &c. from all rents and fervices, except, &c. was tantamount to a releafe of thofe rents and fervices not fpecifically excepted;

cepted, and that by virtue thereof the customary tenement became frank fee, or held in free and common socage; and that the old customary estate, which before was not deviseable, was extinguished, and became thereupon deviseable by the statute of wills. Such customary estates, which are peculiar to the North of *England*, are not freehold, but seem to fall under the same general consideration as copyholds, alienable by bargain and sale and admittance thereon, and not holden at the will of the lord *Doe d. Reay* v *Huntington and others*, *M.* 44 *G.* 3. 271

TIME.

1. The plaintiff is entitled to recover for goods sold and delivered upon credit for a certain time; it appearing by the special memorandum that the bill was filed on a day subsequent to the expiration of the credit, though the writ appeared to have issued before But if the defendant were actually arrested before the credit expired, semble that he has his remedy in damages *Swancott* v *Westgarth*, *T.* 43 *G* 3. 75

2 Where goods were sold upon a contract that the vendee was to pay for them *in three months by a bill of two months* held that the contract was for a credit of *five* months, and therefore that assumpsit for goods sold and delivered could not be brought at the end of three months upon the neglect of the vendee to give his bill at two months; the remedy being by a special action on the case for damages for the breach of contract in not giving such bill *Mussen* v. *Price and another*, *T.* 43 *G* 3. 147

S P. in *Miller* v *Shawe*, *Lancaster* Lent assizes, 1801, cor. *Chambre* J. But after the time of credit expired indebitatus assumpsit lies. *ib.*

TITLE.

See GRANT.

Where one declared in case for obstructing a water-course, upon his *possession* of a mill *with the appurtenances*, and that *by reason of such his possession he had a right to the use of water running in a certain tunnel to the mill*; such allegation is not supported by proof that the tunnel was made on the defendant's land, which he had agreed to let the plaintiff have for this purpose for a certain consideration, but of which *no conveyance* was made by the defendant to the plaintiff, and he had since refused assent: because the plaintiff had not the water *by reason* of his *possession* of the mill, &c. but by parol licence or contract, which could not pass the title to the land; and as a licence was revocable, and revoked. *Fentiman* v. *Smith*, *T.* 43 *G.* 3. 107

TRIAL.

See VENUE.

TROVER.

See EXECUTOR DE SON TORT.

1. Semble, that a sale of the whole of a ship by one who is only a part owner, in exclusion of the right of another who is tenant in common with him, is not equivalent to the *destruction* of the subject matter mediately or immediately, so as to enable his co-tenant to maintain trover against him for it. *Barnardiston* v. *Hubbard*, *T.* 43 *G.* 3. [illegible]

2. But if the subject-matter be actually destroyed by one tenant in common, trover will lie against him by the other tenant. And where it appeared that one tenant in common forcibly took a ship out of the other's [illegible] and secreted it from him, so that he knew not where it was carried [illegible] changed the name of it, and [illegible]

wards got into a third person's hands, who sent it on a foreign voyage where it was lost, Lord C. J. *King* left it to the jury, whether under the circumstances the destruction was not by the defendant's (the tenant in common's) means: and the jury finding in the affimative, the Court, on motion for a new trial, approved of the Chief Justice's direction, and refused to set aside the verdict. *Barnardiston* v. *Chapman*, *H.* 7 *G.* 1. *C. B.* Lord *King's* MS. cited in *Heath* v. *Hubbard.* 121

3. Whether the mere indorsement of a bill of lading to an agent to enable him to receive the goods on account of his principal, without any consideration, will enable such agent to maintain trover in his own name for the goods, Quære? and semble not. *Coxe and others* v. *Harden and others*, *M.* 44 *G.* 3. 211

USAGE.

It seems that cotemporaneous and continued usage may be resorted to in aid of the construction of doubtful words in an old charter. *Rex* v. *Osbourne*, *M.* 44 *G.* 3. 327

USURY.

1. The acceptor of a bill of exchange, dated 4th of *July*, and due 7th of *September*, taking a premium of 6*d.* in the pound from the indorsee and holder for payment of the bill on the 20th of *August* before it was due, is not guilty of usury; there being no loan or forbearance. *Barclay qui tam* v. *Walmsley*, *T.* 43 *G.* 3. 55

2. To make usury there must either be a direct loan and a taking of more than legal interest for the forbearance of repayment; or there must be some device for the purpose of concealing or evading the appearance of a loan and forbearance, when in truth it was such. *ib.*

VENUE.

1. An information at common law for a conspiracy between the captain and purser of a man of war for planning and fabricating false vouchers to cheat the Crown, (which planning and fabrication were done upon the high seas,) is well triable in *Middlesex*, upon proof *there* of the receipt by the Commissioners of the Navy of the false vouchers transmitted thither by one of the conspirators through the medium of the post, and the application *there* of a third person, a holder of one of such vouchers (a bill of exchange) for payment, which he *there* received. *Rex* v. *Brisac and Scott*, *T.* 43 *G.* 3. 164

2. So where an indictment for a conspiracy was laid in *Middlesex*, where acts done by some of the conspirators were proved, acts done by others of the conspirators in other counties were given in evidence against them. *Rex* v. *Bowes and others*, in 1787, cited *ib.* 171

3. An amendment allowed in an action for a penalty under the bribery act, by altering the venue from the county at large to an interior jurisdiction, after the time limited for commencing a new action; the particularity of the declaration making it appear probable to the Court that the plaintiff was proceeding on the same fact for which the action was originally brought when laid by mistake in the wrong county, though there were no affidavit that it was the same. *Petre* v. *Craft*, *H.* 44 *G.* 3. 433

4. Such amendment allowed, though it appeared that there were distinct causes of action in the two different counties; upon an affidavit that the plaintiff proceeded on a mistake in supposing that both causes of action could be proved in the county where the election was holden. *Dover* v. *Mestaer*, *H.* 44 *G.* 3. 435

5. The

The offence of selling coals of a different description from those contracted for, upon the stat. 3 *G.* 2. *c.* 26. *s.* 4. is complete in the county where the coals are *delivered*, and not where they were *contracted* for, the contract not being for any specific parcel of coals, but for a certain quantity of a certain description. But *the not justly measuring* such coals is a local omission of a local act, required by the 13th section of the act to be performed at the place where the coals are kept for sale, at which place the bushel of Queen *Anne* is required to be kept and used for the purpose of measuring the coals into sacks of a certain description, in which they are to be carried to the buyer; and therefore the offence is local, and must be laid in the county where the coals were put into the sacks without having been so *justly measured*. *Butterfield qui tam* v. *Windle and another, M.* 44 *G.* 3. 385

Where the cause of action arose partly in *Derbyshire* and partly in *Ireland*, the Court refused to change the venue from *London* to *Derby*, on an affidavit that the cause of action arose in *D.* and *I.*, and not in *London* or elsewhere than in *D.* and *I.* *Walker* v. *Wright, H.* 44 *G.* 3. 495

VOLUNTEER CORPS.

Members of volunteer corps, enrolled under the regulations of the stat. 42 *G.* 3. *c.* 66. are entitled to resign on due notification of such their intention; not being restrained from such liberty of resignation by the rules of the corps to which they belong, or its conditions of service: and this liberty is not taken away by stat. 43 *G.* 3. *c.* 96. (the General Defence Act), which distinguishes between *volunteer corps*, and *volunteers under that act*; *i. e.* such as offer themselves voluntarily to serve in lieu of the compulsory levy. And the stat. 43 *G.* 3. *c.* 121. attaches only on corps of volunteers *at the time of an actual invasion*, and has no retrospective operation on those who had ceased to bear that character before actual invasion. *Rex* v. *Dowley, H.* 44 *G.* 3. 512

WAGES.

See Assumpsit, No. 1. Master and Mariner, or Embargo.

WATER-COURSE.

See Pleading, No. 1., or Title, No. 1.

WILL.

Where one devised lands to two trustees in trust for certain purposes by a will duly executed and attested; and he afterwards struck out the name of *one* of those trustees, and inserted the names of two others; leaving the general purposes of the trust unaltered, though varying in certain particulars; and did not republish his will: held that his intent appearing to be only to revoke by the substitution of another good devise to other trustees; as such new devise could not take effect for want of the proper requisites of the statute of frauds, it should not operate as a revocation; or at most it could only operate as a revocation pro tanto, as to the trustee whose name was obliterated; leaving the devise good as to the old trustee whose name was retained. *Short, d. Gastrell, Widow,* v. *Smith and another, M.* 44 *G.* 3. 419

WITNESS.

1. In an action on the stat. 2 *G.* 2. *c.* 24. for bribery at an election for members to serve in parliament, it is no objection to the competency of a witness for the plaintiff to prove such bribery,

bribery, that a ſimilar action was pending againſt the witneſs himſelf for bribery at the ſame election, and that he claimed to be the firſt diſcoverer of the bribery of the defendant, and meant to avail himſelf of it, if neceſſary, in caſe of the defendant's conviction. *Heward* v. *Shipley*, *T.* 43 *G.* 3. 180

. *A.* having brought an action againſt *B.*, the latter filed a bill in equity againſt him for a diſcovery and injunction, and for an account; to which *A.* having put in his anſwer, denying the allegations of *B.*, which involved the merits of the ſuit at law, the injunction was diſſolved: on which anſwer *B.* indicted *A.* for perjury; and the indictment and action coming on to be tried at the ſame aſſizes, the indictment ſtanding firſt, held that *B.* was a competent witneſs to prove the perjury, as he could not avail himſelf of the conviction of *A.* in any civil proceeding between them either in law or equity. *Rex* v. *Boſton*, *H.* 44 *G.* 3. 573

. Equity refuſed leave to file a ſupplemental bill in nature of a bill of review in conſequence of a conviction of one, who was a witneſs in the original proceeding, for perjury, which conviction was obtained on the evidence of the plaintiff in the ſuit, as well as of others. *Bartlett* v. *Pickersgill*, *Tr.* 32 & 33 *G.* 3. in Chancery, cited *ib.*

. A habeas corpus ad teſtificandum iſſued to bring up a priſoner to give evidence before an election committee of the Houſe of Commons, on affidavit of ſervice of a rule to ſhew cauſe on the different perſons concerned, and no cauſe ſhewn. *In the Matter of Sir Edward Price, a Priſoner*, *H.* 44 *G.* 3. 587

END OF THE FOURTH VOLUME.

Printed by A. Strahan, Law Printer to His Majeſty,
Printers-Street, London.